FACULTY OF LAW AND CRIMINOLOGY

THE GRAND ETHIOPIAN RENAISSANCE DAM AND THE LAW ON TRANSBOUNDARY RIVERS

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GHENT UNIVERSITY

“The only matter that could take Egypt to war again is water.” –

Egyptian President Anwar Sadat, 1979

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GLOSSARY

Nile Basin: The entire area that is encompassed by the Nile and its tributaries. This dissertation, however, oftentimes refers to the "Nile Basin conflict" as between the Nile riparian states Egypt, Sudan and Ethiopia.

Nile Basin states: States through which territory the Nile flows. This dissertation, however, oftentimes refers to the "Nile Basin states" as being Egypt, Sudan and Ethiopia.

GERD: Grand Ethiopian Renaissance Dam

CFA: Cooperative Framework Agreement

DoP: Declaration of Principles

UNWC: The Convention on the Law of the Non-Navigational Uses of International Watercourses

UNECE Water Convention: The Convention on the Protection and Use of Transboundary Watercourses and International Lakes

The Court: The International Court of Justice

The Permanent Court: The Permanent Court of International Justice

NBI: Nile Basin Initiative

IPoE: International Panel of Experts

TNC: Tripartite National Council

NIRSG: National Independent Research Scientific Group

AU: The African Union

ILC: The International Law Commission

ARSIWA: The Draft Articles on the International Responsibility of States

ILA: International Law Association

The 1902 Agreement: The 1902 Nile Waters Agreement

The 1929 Agreement: The 1929 Nile Waters Agreement

The 1959 Agreement: The 1959 Nile Waters Agreement

The 1969 Convention: The Vienna Convention on the Law of Treaties of 1969

The 1978 Convention: The Vienna Convention on Succession of States in respect of Treaties of 1978

SAMENVATTING

In 2011 kondigde de regering van Ethiopië de plannen aan voor haar volgende elektriciteit genererende dam op de Nijl, genaamd de *Grand Ethiopian Renaissance Dam* (GERD). De enorme capaciteit en locatie van deze elektriciteit genererende dam leidde tot een enorm protest bij haar Noorderburen Egypte en Sudan, die hun watervoorraad en doorstroom beduidend zagen slinken. Het conflict rond de constructie van de GERD kan daarom ook herleid worden naar een veel groter conflict rond de waterbevoorrading en gebruiksvoorwaarden van de Nijl. Een antwoord hierop vinden bezorgt dus ook een antwoord op het vraagstuk m.b.t. de GERD.

In het eerste deel van de masterscriptie zal de kwestie van statenopvolging van verdragen aan bod komen. Doorheen de 20e eeuw zijn er een reeks verdragen gesmeed, al dan niet door koloniale grootmachten. De afdwingbaarheid van deze verdragen t.a.v. de huidige staten in de omgeving zal dus bekeken worden.

In het tweede deel van de masterscriptie wordt gekeken naar het meer algemene internationaal recht van grensoverschrijdende rivieren. Aangezien het gebrek aan allesoverheersende, juridisch bindende instrumenten in de regio van de Nijloever, onderzoekt deze masterproef ook welke gewoonterechtelijke principes er spelen in het recht rond het gebruik van internationale rivieren. Dit zijn uiteindelijk "*the principle of equitable and reasonable use*" en "*the obligation not to cause significant harm*" gebleken.

In het laatste onderzoekende gedeelte worden de verdragen tegenover het gewoonterecht geplaatst en wordt onderzocht welke van de twee prioriteit heeft. Hierbij wordt enkel nog *the 1902 Nile waters agreement* onderzocht, aangezien dit verdrag tussen Groot Brittannië en Ethiopië het enige verdrag is waarbij alle drie de Nijl oeverstaten betrokken zijn. Volgens het *lex specialis* adagium verdient *the 1902 Nile Waters Agreement* voorrang boven het gewoonterecht en blijft het akkoord dus toepassing vinden in de 21e eeuw. Mits de nodige nuances en uitzonderingen op dit regime, die doorheen de masterproef besproken zullen worden, zal *the 1902 Nile Waters Agreement* dus toepassing kunnen blijven vinden, ook op de huidige situatie rond de GERD.

Deze theoretische oplossing wordt in het laatste hoofdstuk echter nog in perspectief gezet tegenover de realiteit. Hoewel het internationaal recht een belangrijke rol speelt in geschiloplossing, valt de politieke invalshoek niet te ontkennen. Maar al te vaak worden regionale conflicten opgelost a.d.h.v. onderhandelingsprocessen i.p.v. werkelijk het opvolgen van theorieën in de rechtsleer. Dit wordt aangetoond a.d.h.v. een vergelijkende *case-study* rond *the Jordan-conflict* in het Midden Oosten.

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1. INTRODUCTION

1. The Nile basin has always been a contested area in the North-East of Africa, because of its shared possession over the Nile River. With its course of 6,695 kilometers, the Nile River is the largest river in the world.[1] Thus, it came to no surprise that when Ethiopia unilaterally announced the construction of the GERD on the Blue Nile, the biggest contributor to the Nile water flow,[2] diplomatic relations between the riparian states Egypt, Sudan and Ethiopia were less than amicable. The announcement of the construction of the GERD in 2011 generated considerable disruption in the Nile Basin Region. Suddenly, the status quo in the Nile Basin was being questioned and Egypt's role as the "*regional hydro-hegemon*" even more so.[3] Both Egypt and Sudan as well as Ethiopia have opposite views on how the Nile should be properly divided between them, on the matter of utilization, as well as water allocation.[4] The GERD's unilateral construction caused a lot of outrage from numerous international players, but the conflict should not solely be reduced to the GERD's construction. The division of water use and river utilization between the Nile riparian states has been a contested subject for over centuries and solving this more general conflict would give insights into the GERD's most suitable solution.

2. The main research question of this dissertation reads as follows:

"*Which rights do Ethiopia, Egypt and Sudan possess to endorse their claims on the Nile waters and how do these reflect on the lawfulness of Ethiopia's unilateral construction of the GERD on the Blue Nile?*"

3. This dissertation poses the question how the regional agreements between Egypt, Sudan and Ethiopia coincide with the international law on the non-navigational use of international waters. To answer this question an examination of the (regional) law on transboundary rivers will ensue. In the case of the Nile Basin region, the latter consists of two categories of law: historical treaty law and the international law on the non-navigational use of international rivers.

4. The treaties referred to are the Nile Waters Agreements, which were concluded well in the 20th century and incite multiple questions concerning the validity of treaties made during the colonial period. To answer these questions the law on state succession regarding treaties will be examined.

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[1] FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS AND IHE DELFT, *Water Accounting in the Nile River Basin, Remote Sensing for Water Productivity,* Rome, FAO WaPOR water accounting reports, 2020, 59 P. en https://www.fao.org/3/ca9895en/ca9895en.pdf .

[2] Infra.

[3] M., TEKUYA, (2020). The Egyptian hydro-hegemony in the Nile basin: The quest for changing the status quo. *The Journal of Water Law*, *26*, 2.

[4] Infra.

5. The colonial question arises because the Nile Waters Agreements were partly concluded during Great Britain's colonial rule on Egypt and Sudan. Thus, this dissertation will thoroughly examine the law on succession. In this respect, the devolvement of colonial treaties onto the newly independent states will also be inspected. The reason these Nile Waters Agreements are so important is that Egypt and Sudan, to this day, claim the rights therein as vested historical rights from which should not be diverged. These rights blatantly favor the two downstream states, Egypt and Sudan, without any hesitation towards the other riparian states' rights on the Nile.

6. Secondly, this dissertation will tackle the principles of non-navigational uses of transboundary rivers in customary international law (both substantially as well as procedurally) and if they apply to Egypt, Sudan, and Ethiopia.

7. After having examined the applicability of the two possible paths of law, a chapter concerning the hierarchy between the two follows. The latter will be essential to provide this dissertation with a conclusion on each Nile Basin states' water rights and the impact this will have or should have had on the GERD's construction. Viewing that rights and obligations go hand in hand, not only the water states' rights will be examined, but also their infractions of the law. This includes the evaluation of whether Ethiopia's unilateral and continuous construction and filling of the GERD, despite downstream states' objections, are internationally wrongful acts by not being coherent with international obligations along the ones above.

8. This dissertation aims to answer what law is applicable in the Nile Basin Region; either the Nile Waters Agreements or the more general international law on non-navigational uses of transboundary rivers and which one prevails. The answer to the latter question will then, hopefully, lead to a solution concerning the GERD-conflict as well.

9. Although this dissertation examines the legal position between Egypt, Sudan and Ethiopia in order to reflect on the lawfulness of the GERD, the focus will be on the tripartite relationship between the Nile Basin states. Only the law applicable between all three Nile Basin states can give a basin-wide view on the lawfulness of the GERD's construction.

10. To not broaden the scope of this research dissertation too much, the research will be limited to only analyzing the Nile Basin conflict from within a legal point of view. This suggests that any other effects the GERD might have on e.g., the climate, geopolitical relations, poverty, … will be left out of the scope of this research.

2. ORIGIN OF THE CONFLICT

2.1. The Nile River Basin: a conflictual region

11. The Nile Basin has always been a contested area in the North-East of Africa. The Nile is a transboundary river shared by eleven countries: Rwanda, Burundi, the Democratic Republic of the Congo, Eritrea, Uganda, the United Republic of Tanzania, Kenya, South Sudan, Ethiopia, Sudan, and Egypt.[5]

12. With its course of 6,695 kilometers, the Nile River is the largest river in the world.[6] The Nile receives water flow from two subbasins, namely the Ethiopian Highlands (The Eastern Nile sub-system consisting of the Blue Nile and the Atbara) and the Great Equatorial Lakes (The Equatorial Nile sub-system consisting of the White Nile).[7] The White Nile sprouts from the Great Equatorial Lakes region in Central Africa, originating in either Rwanda or Burundi and it streams through South-Sudan[8]. While the Blue Nile is responsible for 85 percent of the Nile water supply, the White Nile only provides the remaining 15 percent[9]. This explains why the Nile water flow is under such pressure by the building of the GERD and why it receives so much opposition from downstream states. Downstream states' biggest concern with the GERD is that Ethiopia will not release enough water once the GERD is fully operating. Especially during long seasons of drought this could become a life-threatening situation for Egyptians, who rely almost entirely on the Nile for their water supply and irrigation[10].

D. ZANE, "Nile Dam row: Egypt and Ethiopia generate heat but no power", BBC, https://www.bbc.com/news/world-africa-53327668

13. As seen on the image, the GERD is built on a branch of the Nile River Basin, called the Blue Nile. As 85 percent of the Nile's water supply originates from the Blue Nile, it is easy to

[5] FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS AND IHE DELFT, *Water Accounting in the Nile River Basin, Remote Sensing for Water Productivity,* Rome, FAO WaPOR water accounting reports, 2020, 59 P. en https://www.fao.org/3/ca9895en/ca9895en.pdf .
[6] Ibid.
[7] Ibid.
[8] A., M., NEGM, and S., ABDEL-FATTAH, (2018). Grand Ethiopian Renaissance Dam Versus Aswan High Dam. Cham, Springer. 549.
[9] NEGM, A., M., (2017). The Nile River. Cham, Springer, 741.
[10] D. ZANE, "River Nile Dam: Why Ethiopia can't stop it being filled", *BBC NEWS 2021*, https://www.bbc.com/news/world-africa-53432948

understand that building power generating dams on the Blue Nile can have great repercussions for downstream states like Sudan and Egypt.

14. Due to a current increase in population, the three Nile Basin states are putting a greater strain on the Nile River Basin than ever before. While in 2020 the total population of these Nile Basin states already exceeded 550 million, by the end of 2050 the total population is expected to grow to more than a Billion people.[11] Apart from its water supply the Nile is also used for agriculture, transportation, and the generation of electricity through the building of dams[12].

15. The main issue at hand is the fact that Egypt, Sudan, and Ethiopia each have contradictory interests. This can be explained by climatological and political arguments. Respectively, Egypt and Sudan are the countries, the most and second- to most dependent on the Nile.[13]

16. Due to its almost full dependency on the Nile, Egypt completely opposes the GERD's construction.[14]

17. Sudan, on the other hand, only recently opposed to the GERD. This power generating dam started out as a promising initiative celebrated by the Sudanese to help regulate water flow from the Nile, allowing a third farming season and making it less prone to floods[15] and generating electricity in a time of electricity deficits[16]. This recent attitude switch towards the GERD is best explained by a change in political regime in Sudan and a border dispute between Sudan and Ethiopia. Moreover, Sudan worries that, if the dam's structural safety would prove insufficient, it would flood all villages on the Blue Nile past the Sudanese capital, Khartoum.[17]

18. Ethiopia, with its lower dependency on the Nile water flow, on the other hand, has more freedom to build sustainable power generating dams on the Nile. With the GERD being Africa's biggest hydroelectric plant,[18] Ethiopia is now striving to be the largest power generator in North-East Africa in order to reduce the spreading poverty under its own population by exporting green energy to

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[11] A., M., MELESSE, W., ABTEW & S., A., MOGES, (2021). *Nile and Grand Ethiopian Renaissance Dam*. Springer International Publishing. 525.
[12] J., AWANGE, (2021). The Nile Waters. Cham, Springer. 267.
[13] Y., M., HAMADA, (2017). The Grand Ethiopian Renaissance Dam, its impact on Egyptian agriculture and the potential for alleviating water scarcity (Vol. 55). Springer. 187.
[14] Ibid.
[15] Ibid.
[16] X, "Gerd: Sudan talks tough with Ethiopia over River Nile dam", *BBC NEWS 2021*, https://www.bbc.com/news/world-africa-56799672
[17] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.
[18] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.

neighboring countries.[19] The GERD is Ethiopia's biggest undertaking so far to reach this goal and Ethiopia reiterates that the GERD could also be beneficial for Egypt and Sudan, namely by removing silts and sedimentation.[20]

19. The biggest accelerating aspect of the conflict is the unequal distribution of costs and benefits.[21] On the one hand, the GERD could prove to be a danger to water supply for current and future generations. This would not only endanger basic water supply, but also the livelihood of the majority population of these countries considering the fact that the downstream riparian states predominantly have agricultural economies and they rely on Nile irrigation for their food supply.[22] After the GERD's reservoir is filled up, Egypt and Sudan would become dependent on the operation of the GERD during dry seasons and on how much water flow would be released. As a result of the increase in regional temperatures, hot and dry years became much more frequent during the last decade.[23] Due to the current climate crisis, the water dependency will only worsen throughout time.[24] On the other hand, Ethiopia assigned to the GERD a role of a green power generating dam and claims that the GERD would not have any adverse effects for Egypt and Sudan. Even better, the GERD would provide them with a "more consistent water supply, better siltation prevention, reduced evaporation, and lower electricity costs."[25]

20. In the current social and political climate, states should always tread lightly when in danger of breaching international agreements or international rules of law. Considering the great repercussions the GERD as a 4-billion-dollar project[26] can have on other states' water supply, it is particularly important to reach an agreement on these topics before causing irreversible damage. Sadly, enough this is not always the case. In times of water scarcity, conflicts can escalate quickly. An example of this

[19] MAUPIN, A. (2016). Energy Dialogues in Africa? Is the Grand Ethiopian Renaissance Dam Transforming Ethiopia's Regional Role?. South African Institute of International Affairs, 20.
[20] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.
[21] M., SCHOETERS, (2013). An analysis of a big dam project: the Grand Ethiopian Renaissance Dam, Ethiopia. *Unpublished Mastersthesis. Netherlands: Ghent University*.
[22] A., M., MELESSE, W., ABTEW & S., A., MOGES, (2021). *Nile and Grand Ethiopian Renaissance Dam*. Springer International Publishing. 525.
[23] E., COFFEL, B., KEITH, C., LESK, R., HORTON, E., BOWER, J., LEE, J., MANKIN, "Future Hot and Dry Years Worsen Nile Basin Water Scarcity Despite Projected Precipitation Increases", *American Geophysical Union 2023*, https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2019EF001247
[24] Ibid.
[25] T., ZERGAW, (2024). ''Mediated''Negotiation over the Grand Ethiopian Renaissance Dam: Achievement, Challenges and Prospect. *International Journal of Water Management and Diplomacy*, *1*(7), 5-35.
[26] PARAVICINI, G., "Ethiopia completes third phase of filling giant Nile dam", *reuters.com*, https://www.reuters.com/world/africa/ethiopia-completes-third-phase-filling-giant-nile-dam-2022-08-12/

is a statement from the former president of Egypt, Anwar Sadat, in 1979 who indicated that “The only matter that could take Egypt to war again is water."[27]

21. It becomes clear that even after a decade of attempts the Nile Basin conflict still has not ended. This issue is truly relevant due to its close nexus with climate change, the global growing population and poverty rate and industrialization. In a world where water has become a scarce source it is important to resolve issues concerning this matter with an eye on solidarity and peace. A peaceful dispute settlement would help not only the local population by guaranteeing civilians a sufficient amount of water supply (in particular, Egypt and Sudan), but also providing Ethiopia with the opportunity to make use of their natural recourses to become a big electricity provider in North-East Africa in times where East-Africa is struggling with an electricity shortage.[28] In this stage of the filling of the GERD, it is crucial that agreements on the filling and operation of the GERD see light of day. These agreements can only be acquired after the three states consider each other’s legitimate claim to the Nile waters stemming from international law.

2.2. Relevant arbitrational and treaty history

2.2.1. Introduction

22. In April of 2011 Ethiopia announced the construction of the GERD not knowing that this unilateral decision would result in decade long negotiations[29]. What follows is a chronological overview of this negotiation and treaty making process:

23. Abtew and Dessu, two legal theorists on the GERD, divide this piece of history in three periods: pre-colonial, colonial, and post-colonial.[30]

24. The pre-colonial period will not fall within the scope of this dissertation. This would mean a too big elaboration on the historical part of the Nile Basin conflict and the emphasis of this research paper lies on the legal aspect of the division of the Nile water supply. Therefore, this dissertation starts from the colonial period.

[27] C., L., KUKK, & D., A., DEESE, (1996). At the water's edge--regional conflict and cooperation over fresh water. UCLA Journal of International Law and Foreign Affairs, 1(1), 21-64.
[28] A., MAUPIN, (2016). Energy Dialogues in Africa? Is the Grand Ethiopian Renaissance Dam Transforming Ethiopia's Regional Role?. South African Institute of International Affairs, 20.
[29] H., ATTIA, & M., SALEH, (2021). The political deadlock on the Grand Ethiopian Renaissance Dam.
[30] W., ABTEW, & S., B., DESSU, (2019). *The grand Ethiopian renaissance dam on the Blue Nile*. Dordrecht, Netherlands: Springer International Publishing.

2.2.2. The colonial period

25. During the 20th century Great Britain had multiple colonies in the North-East of Africa, such as Sudan and Egypt. British rule over Egypt and Sudan respectively commenced in the years 1882 and 1889 and both lasted until 1956. Out of self-interest Great Britain strived to ensure their colonies' claims to the Nile water supply. As a result, Great Britain initiated two agreements at the beginning of the 20th century, one with Ethiopia (the 1902 Agreement) and one with Egypt (the 1929 Agreement).[31]

26. The 1902 Agreement established a certain safeguard for downstream water flow, although, there's discussion about the interpretation of this Agreement and how much water flow is guaranteed.[32]

27. In 1929 Great Britain's High Commissioner, Lord Lloyd and Egypt's Prime Minister, Mohamed Mahmoud Pacha,[33] established an Agreement granting Egypt a "veto over any construction project on the banks of the Nile"[34] and allocating respectively 55.5 and 18.5 Billion Cubic Meters of water use to Egypt and Sudan.[35] At the time, Ethiopia itself was not a colony of Great Britain, so it does not recognize the 1929 Agreement between Great Britain and Egypt. Thus, the rules on the third-party status of states will be examined.

2.2.3. The post-colonial period

28. In 1959 an agreement was concluded between Egypt and Sudan confirming the Nile water allocation that happened during the 1929 Agreement.[36] As mentioned above, the British rule over Sudan ended in the year 1956. Hence, Sudan was no longer under a colonial ruler when closing the 1959 Agreement with Egypt, so the law on colonial succession does not need to be applied here.

29. In 1999, during the post-colonial era, the Nile Basin Initiative (NBI) was established.[37] This initiative was meant to facilitate "consultation and coordination among the Basin States for the sustainable

[31] W., ABTEW, & S., B., DESSU, (2019). *The grand Ethiopian renaissance dam on the Blue Nile*. Dordrecht, Netherlands: Springer International Publishing; Helal, M. S. (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 920.
[32] Ibid.
[33] Helal, M. S. (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 920.
[34] H., ATTIA, & M., SALEH, (2021). The political deadlock on the Grand Ethiopian Renaissance Dam.
[35] A., HOWEIDY, "Egypt-Ethiopia Nile water dispute: a timeline", *Ahramonline 2020*, https://english.ahram.org.eg/NewsContent/50/1201/369666/AlAhram-Weekly/Egypt/EgyptEthiopia-Nile-water-dispute-A-timeline.aspx
[36] H., ATTIA, & M., SALEH, (2021). The political deadlock on the Grand Ethiopian Renaissance Dam.
[37] W., ABTEW, & S., B., DESSU, (2019). *The grand Ethiopian renaissance dam on the Blue Nile*. Dordrecht, Netherlands: Springer International Publishing.

management and development of the shared Nile Basin water and related resources for win-win benefits".[38]

30. In 2010 the Cooperative Framework Agreement (CFA) arose from within the structure of the NBI providing the first legal framework on Nile water rights concerning Egypt, Sudan, and Ethiopia. As stated by the NBI this Framework Agreement was meant to enhance "cooperative management and development of the Nile water recourses".[39] According to Egypt and Sudan, on the other hand, the CFA restricted their historical rights to the Nile River Basin and they froze their NBI membership.[40] Thus far, the CFA has only been signed by Rwanda, Tanzania and Ethiopia.[41]

31. After Ethiopia announced the construction of the GERD in April of 2011 an International Panel of Experts (IPoE) was formed in 2012 of two members each from the three riparian states as well as 4 international experts who needed to review possible complications concerning either the GERD's construction, or the filling of the dam.[42] The panel suggested further investigation on the impact the GERD could have on the two riparian states, Egypt and Sudan, but that the GERD's construction on its own was adequate.[43]

32. In 2014 the Tripartite National Council (TNC) was created for each member state to provide members who were responsible for selecting "*international consultancy groups*" to conduct the studies suggested by the IPoE, as mentioned above. The member states' agents could not agree on which consultancy groups to select and their attempts to resolve the issue failed again. In this stage, Egypt insisted that the construction of the GERD be halted until said studies were conducted, but Ethiopia declined Egypt's demand.

33. In 2015 the Declaration of Principles (DoP)[44] emphasizes the importance of implementing the studies recommended by the IPoE in 2012. Furthermore, it underlines that the parties should resolve

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[38] NILE BASIN INITIATIVE, "Who we are", *Nile Basin Initiative* 2023, https://nilebasin.org/index.php/nbi/who-we-are

[39] Nile Basin Initiative, "Cooperative Framework Agreement", *Nile Basin Initiative 2023*, https://nilebasin.org/nbi/cooperative-framework-agreement

[40] H., ATTIA, & M., SALEH, (2021). The political deadlock on the Grand Ethiopian Renaissance Dam.

[41] MAUPIN, A. (2016). Energy Dialogues in Africa? Is the Grand Ethiopian Renaissance Dam Transforming Ethiopia's Regional Role?. South African Institute of International Affairs, 20.

[42] W., ABTEW, & S., B., DESSU, (2019). *The grand Ethiopian renaissance dam on the Blue Nile*. Dordrecht, Netherlands: Springer International Publishing.

[43] H., ATTIA, & M., SALEH, (2021). The political deadlock on the Grand Ethiopian Renaissance Dam.

[44] Infra, chapter 4.2.4 on the Declaration of Principles

the Nile Basin conflict peacefully with attention to Egypt's and Sudan's water supply and urges the riparian states to not cause significant harm and to use the Nile waters equitably and reasonably.[45]

34. In 2018 the National Independent Research Scientific Group (NIRSG) was assembled with the same task as the Tripartite National Council of 2014. The NIRSG was responsible for selecting the international consultancy groups, conducting the IPoE studies. During this stage, the NIRSG discussed the procedures on the filling of the GERD making serious advancements in the negotiation process. However, the dialogue halted when Egypt insisted on a baseline scenario that was linked to their current water use.

35. During the Washington Round in 2019 the United States and the World Bank were invited by Egypt to the negotiations as mere observers. After Ethiopia withdrew from the process in 2020, the US drafted a proposal of an agreement regarding the filling and operation of the GERD in their absence. Ethiopia repudiated the proposal based on the fact that the proposed agreement would be "technically impracticable and too limiting of the energy generation capacity of the GERD".[46] Ethiopia reasoned that the US drafted proposal heavily favored Egypt[47] and they did not need to bring a third party into the negotiations, after which the Trump Administration uttered its positive bias towards Egypt by partly suspending aid to Ethiopia and stating that without an agreement Cairo would blow up the GERD itself.[48]

36. In 2020 Egypt brought this matter of contention around the GERD to the United Nations Security Council (UNSC), while Ethiopia unilaterally proceeded with the filling of the Dam. The African Union (AU) lead a round of negotiations between Egypt, Sudan, and Ethiopia. The AU's initiative resulted in an impasse in 2021. The process repeated itself in June 2021 when Egypt brought the same matter in front of the UNSC, during the filling of the GERD and the UNSC recommended yet another AU-lead round of negotiations between the three riparian states. The tripartite talks eventually got suspended in April 2021.[49]

37. In 2023 the three riparian states finally resumed their negotiations concerning the GERD. They held the first round in August in Cairo and the second one in September in Addis Ababa the same year.[50]

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[45] H., ATTIA, & M., SALEH, (2021). The political deadlock on the Grand Ethiopian Renaissance Dam.
[46] Ibid.
[47] T., ZERGAW, (2024). ''Mediated''Negotiation over the Grand Ethiopian Renaissance Dam: Achievement, Challenges and Prospect. *International Journal of Water Management and Diplomacy*, *1*(7), 5-35.
[48] Ibid.
[49]X, "Third round of tripartite GERD talks kicks off in Cairo", *Ahram Online* 2023, https://english.ahram.org.eg/News/510794.aspx
[50] Ibid.

However, soon after, in September 2023, another setback followed when the Prime Minister of Ethiopia, Abiy Ahmed, announced that the filling of the GERD had been successfully completed.[51] Egypt seeks an agreement between the three riparian states safeguarding each of their interests, but most importantly one that ensures its water security.[52]

38. In March, 2024, Egypt's Minister of Foreign Affairs, Sameh Shokry, once again suspended negotiations on the filling and operation of the GERD, due to Ethiopia's so-called "intransigence and neglect to the principle of good neighboring".[53]

2.2.4. Preliminary conclusion

39. The most significant treaties for the Nile Basin region are the three Nile Waters Agreements and their enforceability will be examined in the next chapter.

40. The CFA and DoP will be examined as well, but in the chapter concerning the law on non-navigational uses of transboundary rivers. Due to the lack of clear ratification,[54] these instruments function more as soft law, rather than treaty law and therefore, should be examined as such.

41. All other negotiation or research initiatives held during the post-colonial period after the 1959 Agreement, such as the NBI, IPoE, TNC, CFA, will solely be used in a factual context to analyze the lawfulness of the Nile Basin states' conduct under customary international law, i.e., the obligation not to cause harm, the obligation to notify and consult,…[55]

[51] X, "Filling of Grand Ethiopian Renaissance Dam on the Nile complete, Ethiopia says", *Aljazeera,* *https://www.aljazeera.com/news/2023/9/10/filling-of-grand-renaissance-dam-on-the-nile-complete-ethiopia-says*

[52] X, "Third round of tripartite GERD talks kicks off in Cairo", *Ahram Online* 2023, https://english.ahram.org.eg/News/510794.aspx

[53] N. EL TAWIL, "Egypt's suspension of negotiations on Renaissance Dam due to Ethiopia's intransigence: FM", *Egypt Today 2024*, https://www.egypttoday.com/Article/1/130751/Egypt-s-suspension-of-negotiations-on-Renaissance-Dam-due-to

[54] Infra.

[55] Infra.

3. HISTORICAL RIGHTS ON THE NILE WATER SUPPLY

3.1. The Nile Waters Agreements

42. The third chapter of this dissertation regards the historical rights on the Nile water supply. What this entails is that, primarily, the two downstream states, Egypt and Sudan base their claim over the Nile waters on the Nile Waters Agreements. The three Nile Waters Agreements concerning the Nile water use, allocation and construction were concluded alternating between the three riparian states during the 20th century. One between Great Britain and Ethiopia (the 1902 Agreement), one between Great-Britain and Egypt (the 1929 Agreement) and lastly, one between the newly independent states[56] Egypt and Sudan (the 1959 Agreement). The Nile Waters Agreements generally establish a more profitable outcome for the two downstream states, Egypt and Sudan, than for Ethiopia. Evidently, Egypt and Sudan support their claims on these agreements, while Ethiopia attempts to delegitimize them.

43. Thus, the importance of this chapter lies in either debunking the downstream states' historical claims, confirming them or something in between. To do so, it should be investigated whether the Nile Waters Agreements are still enforceable on the parties and for that matter, if it even can be enforced against basin states that were not signatories to the agreements. The question whether the Nile Waters Agreements can be enforced on the current issues in the Nile Basin region is a question of continuity. It needs examined whether these agreements stemming from the 20th century can still be enforced to this day. The law on state succession partakes in this, because, as outlined above, the 1902 and 1929 Agreement were initially concluded between the colonizer, Great Britain and respectively, Ethiopia and Egypt. If the agreements do not devolve onto the newly independent states,[57] they will not be viable to enforce in present times anymore. The 1959 Agreement, however, was closed between the two newly independent states: Egypt and Sudan. The question of devolution of treaties is not in play here.

44. First, this dissertation briefly presents what significant clauses the three Nile Waters Agreements have that make them irrefutable to not take into consideration.

[56] Infra.
[57] Infra.

3.2. Provisions of the Nile Waters Agreements

3.2.1. The 1902 Nile Waters Agreement

45. The **1902 Nile Waters Agreement**[58] between Ethiopia and Great Britain was signed on May 15th in the year 1902[59]. This Anglo-Ethiopian Agreement was made to establish the territorial boundary between Ethiopia and the territory that nowadays is called Sudan,[60] among many other things, such as the founding of a Joint Boundary Commission, the leasing of territory and the establishment of a railway route connecting Sudan with Uganda.[61] However, the most controversial provision in the agreement was art. 3, which reads as follows:

"*His Majesty the Emperor Menelik II, King of Kings of Ethiopia, engages himself towards the Government of His Britannic Majesty* ***not to construct, or allow to be constructed, any work across the Blue Nile****, Lake Tsana, or the Sobat which would arrest the flow of their waters into the Nile except in* ***agreement with His Britannic Majesty's Government and the Government of the Soudan*** (sic)."[62]

46. Art. 3 of the 1902 Agreement implied at the time that all downstream governments should agree on any of Ethiopia's constructions on the Nile - especially the Blue Nile, since that is the most contributing stream to the Nile water flow and on which the GERD is situated as well - before enabling them, because they could arrest the flow of the Nile waters. These downstream governments were concluded in art. 3 as the ones from Great Britain and Sudan, which then later, after their independence, became Egypt and Sudan.[63] One could argue that if Egypt and Sudan did not sign off on the GERD's construction beforehand, this means a breach of Ethiopia's contractual obligations. However, the question arises whether Ethiopia even is still bound by these pledges made during the 20th century towards Great Britain. Therefore, it is important to examine whether the 1902 Agreement, which was initially signed by Great Britain, devolves onto Egypt. The international law on state

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[58] E., ULLENDORFF, (1967). The Anglo-Ethiopian Treaty of 1902. *Bulletin of the School of Oriental and African Studies, University of London*, *30*(3), 641–654. http://www.jstor.org/stable/612393

[59] M. S., HELAL, (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 917.

[60] Art. I of the 1902 Nile Waters Agreement; E., ULLENDORFF, (1967). The Anglo-Ethiopian Treaty of 1902. *Bulletin of the School of Oriental and African Studies, University of London*, *30*(3), 641–654. http://www.jstor.org/stable/612393

[61] Respectively articles II, IV and V of the 1902 Nile Waters Agreement; E., ULLENDORFF, (1967). The Anglo-Ethiopian Treaty of 1902. *Bulletin of the School of Oriental and African Studies, University of London*, *30*(3), 641–654. http://www.jstor.org/stable/612393

[62] A., HOWEIDY, "Egypt-Ethiopia Nile water dispute: a timeline", *Ahram online 2020*, https://english.ahram.org.eg/NewsContent/50/1201/369666/AlAhram-Weekly/Egypt/EgyptEthiopia-Nile-water-dispute-A-timeline.aspx

[63] Infra.

succession regarding treaties will be studied in this respect and will help decipher whether Ethiopia is still bound by the obligations therein.

3.2.2. The 1929 Nile Waters Agreement

47. The **1929 Nile Waters Agreement[64],** signed on the 7th of May 1929 in Cairo, is also known as the "prelude to the 1959 Agreement", because it is said that the 1959 Agreement builds on the principles concluded in the former agreement.[65] The 1929 Agreement is interesting because of its territorial scope. During the 20th century Great Britain had a wide colonial reach in the North-East of Africa, but no longer ruled over Egypt, viewing that the latter country officially became independent on the 28th of February 1922.[66] Sudan, however, will only gain independence in the future year of 1956[67] and still has an uncertain status up until that date. At the time of the 1929 Agreement Great Britain and Egypt agree on reserving the conflict of who of the two countries rules over the Sudanese territory until later notice, while primarily agreeing upon Sudanese water allocation and construction rights on the Nile.[68]

48. So, although the agreement was concluded only between Egypt and Great Britain, it was also in force on the Sudanese territory.[69]

49. The agreement is made of two *notes verbales* between Egypt and Great Britain.[70]

50. The first being the communications between the Egyptian President of the Council of Ministers, Mohamed Mahmoud and the British High Commissioner, Lord Lloyd, which were conveyed in the interest of Sudan as a newly developing territory. In its *note verbale*, the Egyptian M. Mahmoud puts that the Egyptian government recognizes that the ongoing Sudanese development calls for a greater

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[64] The 1929 Nile Waters Agreement is actually called as cited: "Exchange of Notes in regard to the Use of the Waters for the River Nile for Irrigation Purposes", but will be referred to in this paper as "the 1929 (Nile Water) Agreement"; LEAGUE OF NATIONS TREATY SERIES, *Exchange of Notes Between His Majesty's Government In The United Kingdom And The Egyptian Government in regard to the Use of the Waters of the River Nile for Irrigation Purposes*. Cairo, May 7 1929, Vol. XCIII, p. 43–116. https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2093/v93.pdf

[65] M. S., HELAL, (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 918-21.

[66] DESPLAT, J., "100 years ago: Egypt is declared to be an independent sovereign State", The National Archives 2022, https://blog.nationalarchives.gov.uk/100-years-ago-egypt-is-declared-to-be-an-independent-sovereign-state/

[67] X., (2005). Republic of the Sudan: Brief Overview of Its History, Structure of Government and Legal System. Washington, D.C., Law Library of Congress.

[68] P., CRABITES, (1929). The nile waters agreement. Foreign Affairs, 8(1), 145-149; Par. 1, of the 1929 Agreement

[69] Ibid.

[70] LEAGUE OF NATIONS TREATY SERIES, *Exchange of Notes Between His Majesty's Government In The United Kingdom And The Egyptian Government in regard to the Use of the Waters of the River Nile for Irrigation Purposes*. Cairo, May 7 1929, Vol. XCIII, p. 43–116. https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2093/v93.pdf

share in the Nile water allocation than they had been using so far, but this should not mean any restrictions to the historical and natural water rights Egypt holds.[71] So, to be understood is that the - in the meantime independent - Egypt is making concessions towards the British government, because the Sudanese development is still in Great Britain's favor. The Egyptian *note verbale* consists of five paragraphs of which only the fourth holds concrete rules. While parts a), c), d) and e) concern practicalities of water allocation systems and ongoing studies on this topic and f) regards peaceful conflict settlement "*in a spirit of mutual good faith*", the most prominent paragraph of this *note verbale* is paragraph 4(b) which goes as follows:

"*Save with the previous agreement of the Egyptian Government,* ***no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches****, or on the lakes from which it flows,* ***so far as all these are in the Sudan or in countries under British administration****, which would, in such a manner as to entail any prejudice to the* ***interests of Egypt****,* ***either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level***."[72]

51. This paragraph inflicted upon Egypt a veto right to any development on the Nile on the upstream territory of Sudan and a strict one at that. The veto power concerns all possible utilizations of the Nile river, because of its broad definition in paragraph 4, b). Any construction that could reduce the Nile water quantity (or lower the water level) arriving in Egypt or alter the date of its arrival can be seen as a breach of the 1929 Agreement, which is a fairly low threshold to be hold up against. However, keep in mind that this obligation to receive Egyptian approval before Nile upstream constructions is due by Great Britain and by extension, the Sudanese territory and does not reflect any obligations on Ethiopia as it was never under British rule and was no party to this agreement.[73]

52. The **second *note verbale*** was the British High Commissioner's reply, which was merely a confirmation of Eypt's first *note verbale*. Lloyd's answer on behalf of Great Britain reiterates that the bespoken irrigation arrangements (and no arrangements on the rule of Sudan whatsoever) will lead to the further development in both Egypt and Sudan and that the safeguarding of Egypt's historical and natural water rights is a fundamental principle of British policy.[74]

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[74] DESPLAT, J., "100 years ago: Egypt is declared to be an independent sovereign State", The National Archives 2022, https://blog.nationalarchives.gov.uk/100-years-ago-egypt-is-declared-to-be-an-independent-sovereign-state/

These communications and thus, the 1929 Agreement centers around preserving Egypt's historical and natural rights on the Nile waters. Sudan is allowed to draw a greater amount of water from the Nile than they did before as long as they do not infringe the already existing water use of Egypt.[75] Once more, Egypt allocated itself a far more beneficial water usage than other Nile riparian states.[76] The allocation of water and regulations with regard to Nile constructions make of the 1929 Agreement a treaty of dispositive nature.

3.2.3. The 1959 Nile Waters Agreement

53. The **1959 Nile Waters Agreement[77]** was concluded between Egypt and Sudan on the 8th of November 1959 and confirms Sudan deserves a share in the Nile waters, such as in the 1929 Agreement.[78] In the 1959 Agreement, however, the allocation here is drawn up in specific allocation numbers, rather than just the statement of the Sudanese need for more water resources and the reassurance that Egypt can keep its historical and natural water rights. In the 1959 Agreement the entirety of the Nile water resources were divided between the two states without any reservation for other riparian states, such as Ethiopia itself, creating a real water-monopoly.

54. As mentioned above, the British rule over Sudan ended in the year 1956. Hence, Sudan was no longer under colonial rule when the 1959 Agreement got concluded with Egypt, so the law on colonial succession does not need to be applied here. This is the biggest difference between the 1929 Agreement and the 1959 Agreement. In the latter the matter of state succession does not have to be taken into regard. The 1959 Agreement was concluded between Egypt and Sudan after they had both gained their independence. For Egypt, this happened in the year 1922, while Sudan had to wait for January first of the year 1956 for their independence.[79] Consequently, Egypt and Sudan were not bound to enforce or conclude any (territorial) treaties, but concluded the 1959 Agreement willingly anyway.[80] Egypt and Sudan both ended up with a water allocation of respectively 55,5 BCM and 18,5

[75] P., CRABITES, (1929). The nile waters agreement. Foreign Affairs, 8(1), 145-149.
[76] P., CRABITES, (1929). The nile waters agreement. Foreign Affairs, 8(1), 145-149
[77] X., (2005). Republic of the Sudan: Brief Overview of Its History, Structure of Government and Legal System. Washington, D.C., Law Library of Congress.
[78] P., CRABITES, (1929). The nile waters agreement. Foreign Affairs, 8(1), 145-149; Par. 1 of the 1929 Agreement
[79] X., (2005). Republic of the Sudan: Brief Overview of Its History, Structure of Government and Legal System. Washington, D.C., Law Library of Congress.
[80] At the time Ethiopia protested against the 1959 Agreement after being left with yet another feeling of inequality between Nile Basin states viewing that the Agreement has no recollection for Ethiopia's water allocation. It is important for Ethiopia to object against such agreements because of the effects it could have on the foreclosure of future use of resources; Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.

BCM with 10 BCM for seepage and evaporation.[81] According to the 1959 Agreement, this water allocation is the sum of the states' "*present acquired rights*" and the share in divided net benefits of the High Aswan Dam and the Roseires Dam between Egypt and Sudan.[82]

55. Moreover, respectively in par. 2, 6) and 7) Egypt agrees to pay compensation for harm to Sudanese properties caused by the Aswan High Dam's reservoir and to displace the population whose lands will be submerged by stored water.

56. Par. 5 of the Agreement holds the general provisions among which are: I) the duty to form a "*unified position during any negotiations with other riparian states*" - which might be relevant for negotiations concerning the GERD.[83]

57. To the eye of the beholder, the 1959 Agreement is a legitimate treaty on Nile water allocation as both state parties willingly endorsed it. However, no reserve had been built up for other upstream riparian states who might also need the Nile for its water recourses.[84] The 1959 Agreement endures critique, due to the lack of a fair water division between all riparian states. A slight remedy to this issue is viewed in art. 4 of the Agreement stating that future water demands of other riparian states should be deducted from both Egypt and Sudan equally.[85]

3.2.4. Preliminary Conclusion

58. The significant impact of the Nile Waters Agreements is evidenced by the provisions withing. These provisions demonstrate the importance of answering the question of the enforceability of the Nile Waters Agreements.

The first Nile Waters Agreement is the Anglo-Ethiopian 1902 Agreement. Among many other territorial provisions, the most contentious provision of the Agreement remains art. 3, which obligated Ethiopia

[81] A. M., ONENCAN, & B., VAN DE WALLE, (2018). Equitable and reasonable utilization: reconstructing the Nile basin water allocation dialogue. *Water*, *10*(6), 707.
[82] Par. 1 and 2, UNITED NATIONS TREATY SERIES 1963, *Agreement for the full utilization of the Nile waters*. Cairo, 8 November 1959, https://treaties.un.org/doc/Publication/UNTS/Volume%20453/volume-453-I-6519-English.pdf
[83] M. S., HELAL, (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 929.
[84] C., MOORE, (1987). The Northeastern Triangle: Libya, Egypt, and the Sudan. Annals of the American Academy of Political and Social Science, 489, 28-39.
[85] M. S., HELAL, (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 931.

to obtain the approval of downstream states (now: Egypt and Sudan) before conducting any constructions across the Blue Nile.

59. The 1929 Agreement between Egypt and Britain addressed water allocation and granted Egypt a veto right to any constructions on the Nile on Sudanese territory, safeguarding Egypt's existing water rights.

60. The 1959 Agreement between Egypt and Sudan allocated specific water rights between the two nations, without consideration for other riparian states like Ethiopia, which, ultimately is the biggest critique against this Agreement.

3.3. The law on state succession regarding treaties

3.3.1. Introduction

61. The Nile Waters Agreements will be studied in two categories: the tripartite Nile Waters Agreement, i.e., the 1902 Agreement and the non-tripartite Nile Waters Agreements, i.e., the 1929 and 1959 Agreements.

62. The 1902 Agreement has a territorial reach over all three Nile Basin states, while the 1929 and 1959 Agreements do not include Ethiopian territory or approval. So, although the question of colonial succession solely applies to the 1929 Agreement and not the 1959 Agreement, this does not pose a problem to the joint approach, because in the case of the 1929 Agreement no state parties question the devolvement of this treaty, as it is beneficial to them.

3.3.2. Impact of the 1978 Convention on state succession regarding treaties

63. The principal international instrument portraying international law for state succession is the Vienna Convention on Succession of States in respect of Treaties of 1978 (hereafter: the 1978 Convention).[86] In its prologue, the 1978 Convention states the necessity of this treaty caused by the "profound transformation of the international community brought about by the decolonization process".[87] When the world began to decolonize a lot of questions were brought up about which rights and obligations (concluded by predecessor states) these new states had to adhere by. After the decolonization process, Egypt and Sudan became newly independent states (also, successor states),

[86] UNITED NATIONS TREATY COLLECTION, *Convention on Succession of States in respect of Treaties.* Vienna, 23 August 1978, *https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=_en*
[87] Ibid.

which art. 2, §1, (f) of the 1978 Convention defines as states of which the territory was dependent on the predecessor state for the international relations before the date of succession of states.

64. Concerning the application of the 1978 Convention, two issues come to mind:

65. First, while Ethiopia and Egypt both ratified the 1978 Convention respectively in 1980 and 1986, Sudan signed it on the 23rd of August 1978, but never ratified it.[88] So, while Egypt and Ethiopia are state parties, Sudan is a third-party state and will only be bound by the rules concluded in the 1978 Convention, if they represent rules of customary international law.[89]

66. Second, seeing Egypt and Ethiopia are in fact parties to the 1978 Convention, the Convention could easily be applied between these two states. However, the principle of non-retroactivity remains in play. According to art. 28 of the Vienna Convention on the Law of Treaties of 1969[90] (hereafter: the 1969 Convention) treaties are only applicable after the date of entry into force of the treaty with respect to the parties in question. However, the principle of non-retroactivity is not one of *jus cogens* and therefore is susceptible to declarations of states to be bound retroactively or to different intentions in the treaty itself.[91] Art. 7 of the 1978 Convention confirms the former by stating that in principle the Convention is not applicable on succession of states before the date of entry into force of the Convention, except when states agree otherwise. The date of entry into force for the 1978 Convention is the 6th of November 1996[92] and both Egypt as well as Sudan gained independence long before that. Therefore, the question whether state succession affected the enforcement of the Nile

[88] UNITED NATIONS TREATY COLLECTION, *Convention on Succession of States in respect of Treaties.* Vienna, 23 August 1978, *https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=_en*

[89] After South-Sudan's independence on July nineth 2011 the new state signed, but not ratified, the 1978 Convention, leaving the rest of the world to fall back on rules of customary international law in order to comprehend the treaty devolution from Sudan to South-Sudan as well; Ø. H., ROLANDSEN & M. W., DALY, (2016). Independent South Sudan. In A History of South Sudan: From Slavery to Independence (pp. 151–159). chapter, Cambridge: Cambridge University Press; M. S., HELAL, (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 953.

[90] UNITED NATIONS TREATY COLLECTION, *Convention on the Law of Treaties.* Vienna, 23 May 1969, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en

[91] N. S., REMBE, (1984). Vienna convention on state succession in respect of treaties: an african perspective on its applicability and limitations, the Comparative and International Law Journal of Southern Africa, 17(2), 131-143; I., SINCLAIR, (1984). The Vienna convention on the law of treaties. 2nd ed. Manchester: Manchester university press, P. 99.

[92] UNITED NATIONS TREATY COLLECTION, *Convention on Succession of States in respect of Treaties.* Vienna, 23 August 1978, *https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=_en*

Waters Agreements does not fall within the scope of the 1978 Convention. Consequently, there will solely be looked at customary international law concerning state succession in relation to treaties.

67. So, while the Convention serves as a valuable instrument for interpreting customs, the 1978 Convention does not portray all international law on the subject. Moreover, it should be considered whether the 1978 Convention is a codification of customary international law or whether the instrument is a revolutionary development of international law on state succession and does not fully reflect state practice.

3.3.3. Customary international law status

68. To determine whether a rule has obtained customary international law status two conditions need to be fulfilled: I) the rule needs to represent consistent state practice and II) the belief of states they are legally bound by these rules.[93]

69. Notable is that there is no hierarchy between treaties and customary international law, and they have a dynamic relationship. Where treaties might codify or even generate customs by their provisions, customary international law fills in the gaps the treaties had not foreseen.[94] The prologue of the 1987 Convention also affirms that for aspects not regulated in this Convention the rules of customary international law still are in force. The latter responds to what legal theorist, Helal, mentions in its introductory statement, namely that the law of state succession suffers "*doctrinal uncertainty and confusion*," and that the aforementioned 1978 Convention does not "wholly reflect customary international law".[95]

70. Therefore, the difficulty in answering the question whether the Nile Waters Agreements impose binding rules on Egypt, Sudan and Ethiopia lies in finding the globally accepted customary international law on state succession. Answers must be found for whether Ethiopia is still bound by Agreements concluded with the predecessor state, Great Britain (1902 Agreement) and whether Egypt and Sudan can enforce Agreements concluded by their predecessor (1929 Agreement). State succession is not an issue for the 1959 Agreement viewing that it was concluded after the Egyptian and Sudanese independence.

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[93] B. D., LEPARD, (Ed.). (2017). *Reexamining Customary International Law*. Cambridge: Cambridge University Press, P. 9.

[94] I., SINCLAIR, (1984). The Vienna convention on the law of treaties. 2nd ed. Manchester: Manchester university press, P. 99.

[95] M. S., HELAL, (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 Nile waters agreement. Emory International Law Review, 27(2), 907-986.

3.3.4. Preliminary conclusion

71. Due to the scarcity of state practice (and lack of uniformity thereof) and due to the fact no general codification on state succession regarding treaties exists, there are very few rules on state succession regarding treaties that have reached the status of customary international law.[96] The 1978 Convention in general might reflect customary international law, but this does not count for all articles.[97] This means that for this dissertation all relevant articles of the 1978 Convention should be made out to be either a codification of customary international law or not.

3.4. Theories on state succession regarding treaties

3.4.1. Three theories on state succession regarding treaties

72. Regarding newly independent states, multiple theories on state succession concerning treaties are in play, such as the *universal succession* theory, the clean slate theory[98] and a variation of the clean slate theory,[99] the *ipso jure* continuity theory[100].

73. The first two rules are codified in the 1978 Convention, providing some clarity:

74. Art. 16 of the 1978 Convention expresses the *Tabula Rasa* theory declaring that newly independent states are not bound by treaties of their predecessor state, nor are they forced to enter these treaties or take part in them. However, the newly independent state can establish party status by unilateral declaration. Some in the international community portray the *Tabula Rasa* theory as having acquired customary international law status and say it reflects state practice. [101]

75. Art. 12 of the 1978 Convention, on the other hand, concludes an exception to the *Tabula Rasa* rule[102] and enforces the universal succession theory with regard to territorial or **dispositive treaties**.

[96] A., ZIMMERMANN, (2006). State succession in treaties. *MPEPIL, November*.
[97] N. S., REMBE, (1984). Vienna convention on state succession in respect of treaties: an african perspective on its applicability and limitations, the Comparative and International Law Journal of Southern Africa, 17(2), 131-143.
[98] Also known as the tabula rasa theory
[99] P., JANIG, (2018). 1978–The 1978 Vienna Convention, the Clean Slate Doctrine and the Decolonization of Sources. *Austrian Review of International and European Law*, *23*.
[100] N. S., REMBE, (1984). Vienna convention on state succession in respect of treaties: an african perspective on its applicability and limitations, the Comparative and International Law Journal of Southern Africa, 17(2), 131-143.
[101] A., ZIMMERMAN, (2006). State succession in treaties. *MPEPIL, November*.
[102] N. S., REMBE, (1984). Vienna convention on state succession in respect of treaties: an african perspective on its applicability and limitations, the Comparative and International Law Journal of Southern Africa, 17(2), 131-143.

According to the International Law Commission, this article[103] provoked numerous comments by governments during an earlier draft of the Convention, of which a substantial majority upheld the dispositive treaties doctrine.

Art. 12 of the 1978 Convention reads as follows:

"1.A succession of States does not as such affect:

> *(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;*
>
> *(b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.*

2.A succession of States does not as such affect:

> *(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;*
>
> *(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.*

3.The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates."

76. In short, treaties regarding the use (or restriction thereof) of territories are not affected by succession of states and therefore stay enforced in these territories regardless of their new independence. This category of treaties is called dispositive or real treaties. The International Law

[103] At an earlier draft in the year 1972, this article corresponded with art. 30; INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

Commission states in its report that there are indications for a general acceptance of the dispositive treaties doctrine.[104]

77. Although there are not many vast criteria to assess the dispositive nature of a treaty, the Commission discloses that this category of treaties should not be interpreted too broadly and defines the doctrine as the situation where "*a State by a treaty grants a right to use territory, or to restrict its own use of territory, which is intended to attach to territory of a foreign State or, alternatively, to be for the benefit of a group of States or of all States generally.*"[105]

78. The dispositive treaties doctrine enjoys significant support within the international community, both in jurisprudence as in actual state practice. An example of this is the Free Zones case.[106] In the Free Zones case of 1929 the Permanent Court of International Justice (Permanent Court) made a statement which the International Law Commission described as being "*the most weighty endorsement*" of the dispositive treaties doctrine thus far.[107] This arbitration in front of the Permanent Court, agreed upon by France and Switzerland, settled an interpretation issue regarding the Treaty of Versailles and whether art. 435, §2, of this treaty had abrogated the prior Treaty of Turin of 1816 between the same parties, a territorial treaty "relative to the customs and fiscal organization of the Free Zones of Upper Savoy and of the District of Gex".[108] The Permanent Court answered the latter question negatively and hence, implicitly confirmed the uninterrupted applicability of the Treaty of Turin, due to its dispositive nature.[109]

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[104] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[105] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[106] Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), 1929 P.C.I.J. (ser. A) No. 22 (Order of Aug. 19); INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[107] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[108] Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), 1929 P.C.I.J. (ser. A) No. 22 (Order of Aug. 19); F., L., JONES, (1924). Upper Savoy and the Free Zones around Geneva, and Art. 435 of the Treaty of Versailles. *Transactions of the Grotius Society*, *10*, 173–188.

[109] Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.), 1929 P.C.I.J. (ser. A) No. 22 (Order of Aug. 19); INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

79. In the year 1962, the International Court of Justice implicitly confirmed the dispositive treaties doctrine when it decided upon the sovereignty dispute between Cambodia and Thailand over the region of the temple of Preah Vihear.[110] The conflict originated from the 1904-1980 Franco-Siamese boundary settlements. The Court confirmed the continuous application of these settlements even though it was not Cambodia, but their French predecessor that had partaken in the boundary settlements.[111]

80. Lastly, the third theory is that of the ***ipso jure*** **continuity** and is also known as the 'Nyerere doctrine', named after Tanganyika's (now Tanzania) prime minister Mwalimu Nyerere who declared upon independence provisional application of former treaties during a period of time while deciding which of these treaties were to be disregarded and which were to abide by. [112] The third theory is therefore seen as a sui generis approach where each newly independent state apple-picks which treaties will devolve onto them after their independence. This succession theory is most supported by upper riparian states.[113] The *ipso jure* continuity is not reflected in the 1978 Convention.

3.4.2. Proliferation of theories on state succession regarding treaties

81. The proliferation of these three theories is best shown in the lack of uniform state practice, which is also the case in the Nile beacon. An example of this are the diverse views different riparian states have on the validity of the 1929 Nile Waters Agreement after their independence from Great Britain. While Tanganyika (now known as Tanzania) declared not to be bound by this Agreement upon their independence,[114] Kenya and Uganda's silence on the matter implied their will to remain bound by it. Egypt issued that all Nile waters Agreements devolve onto riparian states after their independence. Sudan kept a conflicted stance on the matter, not recognizing the binding nature of the Agreement after January first, 1956, but still wanting to revisit their provisions within. Finally, Ethiopia, who was

[110] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C. J. Reports 1962, p. 6.
[111] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C. J. Reports 1962, p. 6; A., P., LESTER, (1962). State succession and localized treaties. Harvard International Law Club Journal 4(2), 145-176
[112] N. S., REMBE, (1984). Vienna convention on state succession in respect of treaties: an african perspective on its applicability and limitations, the Comparative and International Law Journal of Southern Africa, 17(2), 131-143.
[113] A., M, IBRAHIM, (2011). The nile basin cooperative framework agreement: the beginning of the end of egyptian hydro-political hegemony. Missouri Environmental Law & Policy Review, 18(2), 282-313.
[114] M. C. R., (CRAVEN, 2007). The decolonization of international law: state succession and the law of treaties. Oxford [UK]: Oxford University Press

never a subject to the Agreement, because they were never ruled by Great Britain, objected to the idea of restrictions on utilization and construction on the Nile river based on this prior Agreement. [115]

82. Considering the international *lex specialis* principle where 'special rules derogate from general rules,'[116] priority is given to art. 12 over art. 16. of the 1978 Convention. While art. 16 concerns only general treaty devolution after succession of states, art. 12 covers treaty devolution regarding dispositive treaties. Art. 12 has also been granted customary international law status[117] by the International Court of Justice (hereafter 'the Court'), so applicability is no longer an issue. In the Gabcikovo-Nagymaros Case,[118] the Court confirmed the customary international law status of art. 12 of the 1978 Convention, while applying it to the Danube Treaty,[119] signed on the 16th of September 1977.[120] Said treaty was agreed upon between Hungary and Czechoslovakia to establish a series of dams on the Danube[121] with aim to produce hydroelectricity, ameliorate navigation and prevent floods.[122] Hereby, the Court confirms that treaties relating to the use and specifically, the construction works on international waters also qualify as territorial treaties, such as the Nile Waters Agreements, viewing that all three water agreements provide some restrictions on Nile water constructions. A view that was also confirmed by the International Law Commission when it stated that treaties concerning the use of international rivers also qualify as territorial treaties.[123]

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[115] M. S., HELAL, (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 942-943.

[116] Infra; S., ZORZETTO, (2024). The Principle Lex Specialis: Critical Explanation. *Revista de Derecho Privado, 46,* 15-41.

[117] Also, one member of the ILA Committee reiterated that art. 12 reflects customary international law; M. C. R., (CRAVEN, 2007). The decolonization of international law: state succession and the law of treaties. Oxford [UK]: Oxford University Press

[118] Gabcikovo-Nagymaros Project (HungarylSlovakia), Judgment, I. C. J. Reports 1997, p. 7.

[119] UNITED NATIONS TREATY SERIES, *Treaty concerning the construction and operation of the Gabcikovo-Nagymaros system of locks*. Budapest, 16 September 1977, vol. 1109, 235, https://treaties.un.org/doc/Publication/UNTS/Volume%201109/volume-1109-I-17134-English.pdf

[120] Gabcikovo-Nagymaros Project (HungarylSlovakia), Judgment, I. C. J. Reports 1997, p. 7; A., ZIMMERMAN, (2006). State succession in treaties. *MPEPIL, November*.

[121] D., REICHERT-FACILIDES, (1998). Down the danube: the vienna convention on the law of treaties and the case concerning the gabcikovo-nagymaros project. International and Comparative Law Quarterly, 47(4), 837-854.

[122] X, "World Court Digest: Summaries of the Decisions, The Gabcíkovo-Nagymaros Project", *Max-Planck-Institut*, https://www.mpil.de/de/pub/publikationen/archiv/world-court-digest.cfm?fuseaction_wcd=aktdat&aktdat=dec0305.cfm#:~:text=The%20case%20arose%20out%20of,resources%20of%20the%20Bratislava%2DBudapest

[123]INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

83. The restrictions referred to are the veto powers of Egypt and Sudan about constructions made on the Nile river by other riparian states.[124] Maloney confirms that territorial treaties tend to survive state succession, due to widespread state practice and judicial decisions.[125]

84. More difficult to say is whether the universal succession concerning territorial treaties holds stance against the *Ipso jure* continuity rule. The latter has no codification in the 1978 Convention, but has enough widespread state practice, as demonstrated above, making it prone to be made into customary international law.

85. Although enough state practice might be gathered concerning the ipso jure continuity rule (or the Nyerere doctrine) with occurring state succession, the second condition of reaching customary international law status has not been fulfilled. The whole premise of the Nyerere doctrine is one of sovereignty. Newly independent states should be able to decide upon independence whether certain treaties devolve onto them after state succession. The belief that this newly independent state should somehow be obliged to do so is inherently aversive to the *ipso jure* continuity rule. Therefore, it could be assumed the *ipso jure* continuity rule is not of customary international law status. In this respect, the difficult relationship between legal theory and modern state practice will be discussed in the seventh chapter of this dissertation.

3.5. Historical water rights based on the 1902 Agreement

3.5.1. Dispositive treaties doctrine

86. Aforesaid, it is important with regard to the examination of the GERD's legitimate character to consider the matter of state succession regarding treaties, in this case, the 1902 Nile Waters Agreement. If the 1902 Agreement does not devolve onto the newly independent states Egypt and Sudan, Ethiopia could be alleviated by the obligations mentioned in art. 3 of the 1902 Agreement.

87. Viewing that the Anglo-Ethiopian agreement was aimed at regulating the territorial boundary between Sudan and Ethiopia, there is little doubt about the fact that this agreement falls under the dispositive treaties regime as it literally manages territorial matters. However, the most significant article of this agreement for this research paper remains art. 3. Luckily, since the Gabcikovo-Nagymaros Case, the International Court of Justice stated that also treaties concerning water stream constructions

[124] Infra.

[125] M. G., MALONEY, (1979). Succession of states in respect of treaties: the vienna convention of 1978. *Virginia Journal of International Law, 19(4),* 885-914.

fall within the dispositive treaties doctrine. Therefore, no abstraction needs to be made between art. 3 of the 1902 Agreement and the others, because all provisions embody a territorial essence.[126]

88. In the same case the Court once more confirmed the principle of continuity regarding devolution of dispositive treaties onto newly independent states.[127] Obligations within territorial treaties do not cease to apply when state succession occurs. Hence, the obligation for Ethiopia to obtain Britannic agreement prior to the construction of waterworks on the Nile within the 1902 Agreement would remain enforceable by Egypt and Sudan as successor states of Great Britain. The same view has been shared by Yihdego that states that Ethiopia, at the time, was already an "*independent sovereign state*" and agreed with the terms in the 1902 Agreement.[128] Therefore, the unilateral decision by Ethiopia to construct the GERD goes against art. 3 of the 1902 Agreement and hence, is an internationally wrongful act, as defined in art. 2 of the UN Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[129]

The article 2 goes as follows:

"There is an internationally wrongful act of a State when conduct consisting of an action or omission:

*(a) is **attributable** to the State under international law; and*

*(b) constitutes a **breach of an international obligation** of the State."*

3.5.2. Preliminary conclusion

89. Thus, if under the hypothesis that the 1902 Agreement remains applicable between the three Nile Basin states, both conditions to article 2 are fulfilled. The GERD's unilateral construction not only was a conscious and premeditated decision prompting attributability, but also comprises of a breached international obligation, namely art. 3 of the 1902 Agreement, the obligation to acquire downstream approval before constructions on the Nile.

3.5.3. Exceptions to the dispositive treaties doctrine

3.5.3.1. Introduction

90. Viewing the colonial history of North-Eastern Africa and the probable cause of Ethiopia's initial consent to the 1902 Agreement being the international force of Great Britain, it might seem unfair

[126] GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.
[127] GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.
[128] Z., YIHDEGO, (2017). *The fairness 'dilemma' in sharing the nile waters: What lessons from the grand ethiopian renaissance dam for international law?*. BRILL.
[129] INTERNATIONAL LAW COMMISSION, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

Ethiopia would still be bound by a treaty concluded decades ago with a colonial predecessor. The continued applicability of the 1902 Agreement might create an uneven playing field between the Nile riparian states. Then, the question remains whether exceptions to these theories of state succession regarding treaties exist and even more so if Ethiopia could apply one of them.

91. The International Law Commission (ILC) mentioned in its commentary to the 1978 Convention that the initial binding nature of a dispositive treaty, due to them being a special category within state succession, does not impede a state's efforts to not be bound by questioning the validity or through other judicial arguments.[130]

92. The existence of exceptions to the dispositive treaties doctrine is evidenced by Tanganyika's renunciation of the (territorial) 1921 and 1951 Belbases Agreements in which Great Britain arranged for Belgium the leasing of Tanganyika port sites and transit provisions.[131] After its independence, Tanganyika claimed the Belbases Agreements to be void and declared to no longer be bound by them. Rather than resorting to the clean slate approach, Tanganyika based its reasoning on an exception to the dispositive treaties doctrine and thereby, not only confirming the existence of the dispositive treaties doctrine, but also exceptions therefrom. For this exception, Tanganyika used the sovereignty approach, stating that its colonial predecessor did not have the authority to bind Tanganyika in the Belbases Agreements.[132] This precedent shows us that exceptions to these succession doctrines are possible. Yet, Ethiopia cannot use the same sovereignty approach as Tanganyika because Ethiopia itself did not undergo state succession and has no legal nexus with Egypt or Sudan's sovereignty issues. Thus, exceptions to the dispositive treaties doctrine might exist, but it is yet to see whether they could be applied by Ethiopia.

93. Two exceptions to the dispositive treaties doctrine will be examined here, as well as one ground of justification in case of breach of the 1902 Agreement by Ethiopia.

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[130] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[131] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[132] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

3.5.3.2. Exception of self-determination

94. Firstly, Ethiopia might try to prove the invalidity[133] of the 1902 Agreement by mentioning art. 53 of the 1969 Convention which states that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.[134]

A peremptory norm of general international law (in short, a *jus cogens* norm) is defined as:

"a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[135]

95. The question here is whether there is a principle holding *jus cogens* status that defends Ethiopia's derogation from the 1902 Agreement, rendering it void.

One of the *jus cogens* norms that could be invoked is the right to self-determination.[136]

96. Great Britain, although never really having colonized Ethiopia, still to this day (through succession) exercises an enormous influence on Ethiopia's self-determination by not enabling them the same right of water constructions on the Nile as do Egypt and Sudan. The economical self-determination of Ethiopia takes a hit when not being able to build power generating dams on the Nile, due to a lack of downstream approval, while for Egypt and Sudan, no Ethiopian endorsement is needed.[137] If the right to self-determination renders the 1902 Agreement void, no prior authorization should have been needed by Egypt – solely based on the 1902 Agreement - to build the GERD in 2011.

97. The right to self-determination can be described as "the collective right of a people to freely determine their own political status and to pursue economic, social and cultural development" and

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[133] I., SINCLAIR, (1984). The Vienna convention on the law of treaties. 2nd ed. Manchester: Manchester university press, P. 99.
[134] Art. 53 of the 1969 Convention
[135] Ibid.
[136] K., PARKER, (1989). Jus cogens: compelling the law of human rights. Hastings International and Comparative Law Review, 12(2), 411-464; A., M, IBRAHIM, (2011). The nile basin cooperative framework agreement: the beginning of the end of egyptian hydro-political hegemony. Missouri Environmental Law & Policy Review, 18(2), 282-313.
[137] While Ethiopia is being scandalized for resurrecting the GERD, Egypt built the Aswan High Dam in the year 1970 and is very economically beneficial for Egypt; BRITANNICA, T. EDITORS OF ENCYCLOPAEDIA, "Aswan High Dam", *Encyclopedia Britannica*, https://www.britannica.com/topic/Aswan-High-Dam

states that the right to economical self-determination became equally as important as political self-determination.[138]

98. The uprising of the right to self-determination commenced after the first world war, during the decolonization process.[139] One facet of the right to self-determination is the "permanent sovereignty over natural resources",[140] which separately also holds jus cogens status.[141] The principle of permanent sovereignty over natural resources emerged after 1945 in response to the challenges stemming from foreign ownership of newly independent states' natural resources.[142] The General Assembly states in resolution 1803 that "*The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned*."[143] The latter is most definitely true for the GERD, viewing the dam's intent for reducing the Ethiopian people's poverty by generating green electricity.

99. Interesting in this respect is Orakhelashvili's statement in which he says that "Contracts concluded in the exercise of permanent sovereignty are not derogations from the principle; rather, there would be derogation if a state entered into an agreement through which it waived the right to take decisions on all or part of its natural resources."[144] The author denies the paradoxical nature of the peremptory norm that is the permanent sovereignty over natural resources. A state's right to choose does not endanger the validity of the permanent sovereignty principle, but confirms it. By choosing, it avails itself of its rights under this principle.[145] However, as Orakhelashvili states above, by waiving the ability to make decisions upon its natural resources a state's permanent sovereignty over its natural resources could be harmed. This reasoning relieves Ethiopia from the downstream veto powers on Nile construction within the Agreement since it holds a permanent waiver of its right to choose upon the

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[138] K., PARKER, (1989). Jus cogens: compelling the law of human rights. Hastings International and Comparative Law Review, 12(2), 411-464.
[139] W., C., A., VON UNGERN-STERNBERG, & K., ABUSHOV, (2014). Self-determination and secession in international law. First edtion. Oxford, United Kingdom: Oxford University Press.
[140] S., VERHOEVEN, (2011). Norms of Jus Cogens in international law: A positivist and constitutionalist approach. S.l.: s.n; East Timor (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90; The importance of the permanent sovereignty over natural resources was reiterated by the UNGA in the following resolution: GENERAL ASSEMBLY OFFICIAL RECORDS, *General Assembly resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources*, 14 December 1962,https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/resources.pdf
[141] A., ORAKHELASHVILI, (2006). Peremptory norms in international law. Oxford: Oxford university press.
[142] N., RAVICHANDRAN, (2014). Restricting Sovereignty Transboundary Harm in International Environmental Law. Environment, Law and Society Journal (ELSJ), 2, 91-104.
[143] GENERAL ASSEMBLY OFFICIAL RECORDS, *General Assembly resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources*, 14 December 1962,https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/resources.pdf
[144] A., ORAKHELASHVILI, (2006). Peremptory norms in international law. Oxford: Oxford university press.
[145] A., ORAKHELASHVILI, (2006). Peremptory norms in international law. Oxford: Oxford university press.

utilization of its own resources. Applying the self-determination jus cogens principle, which also includes the permanent sovereignty over natural resources principle, the 1902 Agreement could be rendered void under art. 53 of the 1969 Convention.

100. Nonetheless, the success of the exception of self-determination remains uncertain, because most precedents in similar cases are from the perspective of oppressed peoples that had their decision making right grasped away by a foreign or estranged government. This is not the case for Ethiopia, as its government concluded the Anglo-Ethiopian treaty in full liberty and independence. The right to self-determination of a people is mostly used to evade either the entire rule of a foreign government or to evade the application of a treaty concluded by an earlier government that they claim not to be their own or that did not have authority to close these agreements, which is not the case for Ethiopia.

3.5.3.3. Unequal treaties doctrine

101. **Secondly, Ethiopia could invoke the unequal treaties doctrine** to disregard the 1902 Agreement. Finkelstein makes the comparison between the socialist – meaning the Chinese and Soviet – unequal treaties doctrine and the Western theory of coerced treaties, expressed in art. 52 of the 1969 Convention.[146] Notwithstanding their same approach to get around the *pacta sunt servanda* adage, these two theories differ on many subjects, but most importantly that when applying art. 52 of the Convention, the formal termination procedure should be followed, whereas with the unequal treaties doctrine, this happens by **unilateral declaration of the weaker party and can be applied retroactively on past treaties.** The socialist view is that when treaties are inequal (either procedurally or substantially) they are void *ab initio* and are rendered unenforceable.[147] With regard to the 1902 Agreement the inequality situates itself in the substance, namely the lack of reciprocity regarding the construction rights on the Nile. Where Egypt builds constructions on the Nile as they please (such as the Aswan High Dam), Ethiopia is still obliged to obtain Egypt's approval. This is inequal and according to the Chinese and Soviet legal tradition Ethiopia is now entitled to unilaterally declare its inapplicability. The unequal treaties theory developed a lot of support in China and in the past, the Soviet Union, but the Western legal culture has remained unfamiliar with the concept. However, this does not preclude the theory gaining customary international law status.

[146] J. A., FINKELSTEIN, (1979). An examination of the treaties governing the far-eastern sino-soviet border in light of the unequal treaties doctrine. Boston College International and Comparative Law Journal, 2(2), 445-476.
[147] Ibid.

102. As stated above, customary international law's first condition is consistent state practice.[148] This practice, however, is not required to be worldwide. The preconditions of consistent state practice and opinion juris are not fixed on a certain amount and are rather interchangeable on a sliding scale.[149] In the North Sea Continental Shelf case[150] the ICJ showed that when a norm is big on *opinio juris*, but has little state practice, it still can gain customary international law status, if the putative norm expresses substance to do good and is efficient in achieving the goals of international law, such as peace, human rights, …[151] In conclusion, the fact there are opposing views on the matter – namely, the western continuity view versus the socialist unequal treaties doctrine – does not preclude the acquisition of customary international law status, if enough state practice is gathered. Viewing China and the former Soviet's considerable territorial reach and the application of the doctrine on the treaties of Aigun and Peking and the treaty of Nerchinsk,[152] it is concluded that sufficient state practice has been reached. *Opinio juris* is also sufficient, in this respect, due to the socialist belief that the unequal treaty doctrine is to be applied on all inequal treaties throughout time. This doctrine is of great relevance, because, if applied, Ethiopia could unilaterally declare the 1902 Agreement void and therefore unenforceable.

3.5.3.4. Rebus sic stantibus

103. Important to note is that Ethiopia could not terminate the treaty (according to art. 62 of the 1969 Convention), due to a fundamental change of circumstances since the time Ethiopia signed the 1902 Agreement. This principle is also known as the *rebus sic stantibus* maxim. It could be argued that the disappearance of the colonial powers in the North-East of Africa during the 20th century suffices as a fundamental change of circumstances since the signature and that Ethiopia at the time being occurred in a state of duress by not being able to deny this treaty to Great Britain. In modern times, however, it seems inequitable that the downstream states still hold a veto power over Ethiopia's head. Notwithstanding all the former, art. 62, 2), a) of the 1969 Convention hinders the application of the *rebus sic stantibus* principle to dispositive treaties.[153] Although ample legal scholar has advocated to

[148] B. D., LEPARD, (Ed.). (2017). *Reexamining Customary International Law*. Cambridge: Cambridge University Press, P. 9.
[149] J., TASIOULAS, (2007). Customary international law and the quest for global justice. In The Nature of Customary Law: Philosophical, Historical and Legal Perspectives. Cambridge University Press.
[150] North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3.
[151] Ibid.
[152] Ibid.
[153] T., RUYS, (2017). Inleiding tot het internationaal recht. Gent: VRG; Art. 62, 2), a) of the 1969 Convention states that the rebus sic stantibus principle is not enforceable against treaties that establish a boundary, which

apply the legal maxim to dispositive treaties,[154] this dissertation will not apply it *contra legem* and it, therefore, will be exempted from application to the 1902 Agreement, as it is a dispositive treaty.

3.5.4. Justification for treaty breaches

104. **Lastly,** if Ethiopia would not be able to shake their obligations under the 1902 Agreement, **it could invoke the state of necessity as a means of justification** for their breach of art. 3 of the 1902 Agreement by their construction of the GERD and thus escape liability. It needs mentioning that this provision must be interpreted strictly.

105. In the Gabcikovo-Nagymaros case Hungary plead the necessity plea as well but could not adhere to the high standards the Court had set up for it. Although the Court recognized the customary international law status of the necessity plea as precluding the wrongfulness of acts not in conformity with international obligations, it also states that it should only be applied exceptionally.[155]

106. The ICJ mentions art. 33 (now, art 25.) ARSIWA by the International Law Commission, stating the preconditions[156] of applicability of the principle of necessity:[157]

I) The internationally wrongful act was the only means of safeguarding an essential interest of the state against a grave and imminent peril;

II) The wrongful act did not seriously impair an essential interest of the state towards which the obligation existed;

III) The international obligation with which the act of the state is not in conformity may not arise out of a *jus cogens* norm;

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can be categorized as dispositive treaties. As seen before, the International Court of Justice articulates in the Gabcikovo-Nagymaros case that treaties concerning river construction also fall within the category of dispositive treaties. So, a reasoning by analogy leads us to believe that in this case changed circumstances cannot initiate the termination of the 1902 Agreement by Ethiopia, because of the dispositive nature of the 1902 Agreement.

[154] A., M, IBRAHIM, (2011). The nile basin cooperative framework agreement: the beginning of the end of egyptian hydro-political hegemony. Missouri Environmental Law & Policy Review, 18(2), 282-313; A., P., LESTER, (1962). State succession and localized treaties. Harvard International Law Club Journal 4(2), 145-176; A., KEITH, (1907). Theory of State Succession: With Special Reference to English and Colonial Law. London, Waterlow and Sons, Ltd.

[155] GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.

[156] These conditions have also been granted customary international law status; GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.

[157] Whereas the ICJ referred to art. 33 of the Draft Articles in the year 1997, the current, parallel article is art. 25 of the Draft Articles adopted in 2001; INTERNATIONAL LAW COMMISSION, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf; INTERNATIONAL LAW COMMISSION*, Draft Articles on State Responsibility with Commentaries thereto adopted by the International Law Commission on first reading*, 1997, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_1996.pdf

IV) The broken international obligation may not be laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation;

V) The state in question has not contributed to the occurrence of the state of necessity.[158]

107. Concerning the first precondition, Ethiopia could raise their essential interest in solving their poverty issues and the general need for an electricity provider in East-Africa.[159] However, grave, the poverty and electricity perils are not imminent enough and most definitely cannot solely be solved by the construction of the GERD. Other power generating plants could have been resurrected, even if the GERD might have been the most cost-efficient. Moreover, the second precondition cannot be fulfilled, because the wrongful act did in fact seriously impair an essential interest of the state towards which the obligation existed. Namely, by building the GERD, Ethiopia impaired Egypt's national interest in water supply and irrigation of the Nile. To conclude, Ethiopia will probably not be able to rely on the state of necessity as a means of justification for their breaches of the obligations within the 1902 Agreement.

3.5.5. Preliminary conclusion

108. Regarding the fact that the *rebus sic stantibus* principle cannot be applied to dispositive treaties: exceptions to the dispositive treaties doctrine, the only two viable exceptions to the dispositive treaties doctrine are the following: I) the application of the *jus cogens* principle of self-determination and more specifically, the permanent sovereignty over natural resources and II) the unequal treaties doctrine. The former of the two seems the most obtainable exception to the 1902 Agreement, viewing that the principle of self-determination received widespread state practice and acceptance during the decolonization process after the first world war.

109. As a last resort and, if the exceptions to the dispositive treaties doctrine cannot be applied, the state of necessity can be raised as a means of justification for breaching art. 3 of the 1902 Agreement by building the GERD.

[158] GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1. C. J. Reports 1997, p. 7.
[159] Supra.

3.6. Ethiopia's third-party status towards the 1929 and 1959 Agreements

3.6.1. Pacta tertiis nec nocent nec prosunt

110. Ethiopia has never been under British colonial rule and remained independent during the conclusion of the 1929 and 1959 Agreements. Hence, Ethiopia's relationship towards these agreements was as a third-party state and is therefore not bound by them.[160] And the question occurs whether a third-party state can be bound by these two latter Nile Waters Agreements. The international law maxim of "*Pacta tertiis nec nocent nec prosunt"* discloses that third-party states are generally not bound by treaties they are not a part of, which is also the case for Ethiopia and the 1929 and 1959 Agreements. Articles 34 through 37 of the 1969 Convention confirm this belief.

111. Art. 35 of the 1969 Convention concerning "*obligations for third States"* goes as follows:

"An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

112. Viewing that Ethiopia never expressly accepted the 1929 and 1959 Agreements in writing, no third-party obligations can be placed upon Ethiopia vested in these agreements.

113. However, when a third-party state has always complied with the rules within an agreement this might form international customs and, therefore, the source of the obligation would lie not in the treaty itself, but in the custom.[161]

114. Article 38 of the 1969 Convention defines this phenomenon as follows:

"Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

115. Only Egypt and Sudan ratified the 1969 Convention. After having signed the 1969 Convention on the 30th of April 1970, the country never ratified it.[162] Therefore, it also must be considered whether art. 38 of the 1969 Convention even applies to Ethiopia. Art. 38 of the 1969 Convention *an sich* does not bind Ethiopia. The rule within, however, gained customary international law status as the Court

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[160] A., M, IBRAHIM, (2011). The nile basin cooperative framework agreement: the beginning of the end of egyptian hydro-political hegemony. Missouri Environmental Law & Policy Review, 18(2), 282-313.
[161] I., SINCLAIR, (1984). The Vienna convention on the law of treaties. 2nd ed. Manchester: Manchester university press, P. 99.
[162] UNITED NATIONS TREATY COLLECTION, *Convention on the Law of Treaties. Vienna, 23 May 1969,* *https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en*

affirmed in the North Sea Continental Shelf Case when it stated that the codifications of rules in treaties of which one state is not a party do not automatically mean they are not of a binding nature for this third-party state.[163]

116. Thus, however the two agreements are not directly applicable, the question prevails whether Ethiopia created customary international law in the past by abiding by rules concluded in the agreements. In the North Sea Continental Shelf Case the Court created criteria stating whether treaty provisions itself could generate customary international law.[164]

Those criteria are:

I) *The provision should "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law".*

II) *There must be a very widespread and representative participation in the Convention, particularly of those states whose interests are specifically affected.*

III) *There must be opinion juris reflected in extensive state practice uniform with the provision*.[165]

117. Applied to the 1929 and 1959 Agreements and furthermore, the North-East African states, it seems not all three preconditions are fulfilled.

118. The second precondition is most definitely not fulfilled. Due to the North-East African states' newly found grasp on sovereignty during the 20th century, the riparian states whose interests are specifically affected by the Nile Waters Agreements, due to their own dependency on the Nile waters, refuse to participate in these prior arrangements no more.

119. Moreover, active participation is required, while Tanganyika and Ethiopia objected to be bound by restrictions such as in the 1929 Agreement and Kenja and Uganda remained quiet on the subject, also not participating in it.[166][167]

[163] E. W., VIERDOG, (1982). The law governing treaty relations between parties to the vienna convention on the law of treaties and states not party to the convention. American Journal of International Law, 76(4), 779-801.
[164] North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3.
[165] I., SINCLAIR, (1984). The Vienna convention on the law of treaties. 2nd ed. Manchester: Manchester university press, P. 99.
[166] Supra.
[167] M. S., HELAL, (2013). Inheriting international rivers: state succession to territorial obligations; south sudan, and the 1959 nile waters agreement. Emory International Law Review, 27(2), 942-943.

120. The last precondition, consequently, also has not been fulfilled, due to lack of opinion juris to be bound by the restrictions within the 1929 and 1959 Agreements. This has once more been shown by the unilateral construction of the GERD and Ethiopia having no recollection whatsoever of its restrictions thereto.

3.6.2. The 1929 and the 1959 Nile Waters Agreement

121. The most pressing question is whether Egypt can rely on the **1929 Agreement** to uphold their veto right on upstream Nile construction. For Egypt, the agreement was already favorable and therefore the question isn't whether Egypt is obliged to enforce it, due to devolvement of dispositive treaties, but rather if it is entitled to the enforcement of said agreement towards Ethiopia, as a third-party state. Therefore, the matter of state succession plays little part here because states - in this case, Egypt - can always willingly enforce prior agreements, due to the *ipso jure* continuity theory.

122. However, towards the 1929 Agreement Ethiopia holds third party status, because it never took part in it, nor was their territory ever under British rule.[168] The same issue returns under the 1959 Agreement.

123. The **1959 Agreement** might be legitimate between Egypt and Sudan, but as said above, keeps quiet on upstream water needs and surely cannot legally bind upstream riparian states who have not signed or ratified the Agreement.

3.7. Preliminary conclusion

124. While the **1902 Agreement** withstood state succession and, due to its dispositive status, is still enforceable in Ethiopia, there are some plausible exceptions to be considered. Art. 53 of the 1969 Convention as well as the unequal treaties doctrine are worth trying to apply to the 1902 Agreement. If resided with these arguments, the 1902 Agreement is rendered void and Ethiopia would be dismissed from the obligations within the 1902 Agreement, such as to be granted approval for the construction of the GERD.

125. For the last two Nile Waters Agreements, **the 1929 and 1959 Agreement**, there is more certainty regarding Ethiopia's remaining obligations stemming from them.

126. An obligation cannot stem solely from within a treaty to which a country holds third-party status. Towards the 1929 and 1959 Agreements, Ethiopia is a third country and therefore cannot be forced based on these treaties alone, to obtain prior approval before building the GERD in 2011. After a glance at art. 38 of the 1969 Convention and the criteria upheld in this respect by the Court in the North Sea

[168] Infra.

Continental Shelf Case, it is concluded that the provisions within the 1929 and 1959 Agreement did not fulfill the criteria for the creation of customary international law. Thus, no provisions (not directly, nor substantially) from the last two Nile Waters Agreements, are to be applied on Ethiopia and its resurrection of the GERD.

127. To summarize, the sole Nile Waters Agreement with possible enforcement in all three riparian states is the 1902 Agreement. Therefore, only this agreement could warrant an internationally wrongful act by Ethiopia's decision to build the GERD. Notwithstanding that the 1902 Agreement could be declared void, if seen as infringing with Ethiopia's right to self-determination or if it appears opposing the unequal treaties doctrine. If this fails, Ethiopia could still try to invoke the state of necessity to justify their breach of art. 3 of the 1902 Agreement by unilaterally constructing the GERD.

128. Either way, even if Ethiopia can escape the application of art. 3 of the 1902 Agreement, that does not imply that the GERD was rightfully built. A careful assessment of customary international law on the non-navigational uses of transboundary rivers will follow to decide upon any internationally wrongful acts.

4. LAW ON TRANSBOUNDARY RIVERS

4.1. Introduction

129. As was explained in the introduction, this dissertation consists of two main prongs, one being the so-called historical rights on the Nile vested in the Nile Waters Agreements and the second being the international law on non-navigational uses of transboundary rivers.

130. Since there is no comprehensive international treaty framework enforceable against all Nile Basin riparian states,[169] in its second part this dissertation discusses the international law on non-navigational uses of transboundary rivers instead and a couple of legislative initiatives in this regard.

4.2. Legislative initiatives

4.2.1. UN legislative initiatives

131. Over the past few years, the United Nations has housed several legislative initiatives in the field of international rivers[170] with the most important ones being the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (hereafter, the UNECE Water Convention)[171] and the Convention on the Law of the Non-Navigational Uses of International Watercourses (UNWC).[172]

132. The greatest issue regarding the two Conventions is that the three riparian states did not participate in the conventions.[173] Therefore, the provisions included in these conventions[174] are not directly applicable to the Nile Basin region based on the Conventions alone. The remaining ambiguity surrounding the relationship between the principles of equitable and reasonable utilization and the

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[169] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.

[170] Where the UN Watercourses Convention uses "*international watercourses"* as their subject of international law, the UNECE Water Convention uses the term "transboundary waters". For the purpose of this paper, we assume both have the same general connotation; F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.

[171] UNITED NATIONS TREATY SERIES 2001, *Convention on the Protection and use of Transboundary Watercourses and International Lakes*. Helsinki, 17 March 1992, 269-288, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5&chapter=27&clang=_en

[172] UNITED NATIONS TREATY COLLECTION, *Convention on the Law of the Non-Navigational Uses of International Watercourses.* New York, 21 May 1997, *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&clang=_en*

[173] X. "CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES Helsinki, 17 March 1992", *United Nations Treaty Series* 2001, 269-288; UNITED NATIONS TREATY COLLECTION, *Convention on the Law of the Non-Navigational Uses of International Watercourses.* New York, 21 May 1997, *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&clang=_en*

[174] e.g., art. 5 UNWC: the principle of equitable and reasonable utilization and participation

obligation not to cause significant harm might be the reason the UNWC has known such a slow ratification process.[175] Although both Conventions are useful tools of international water law, will this research paper focus on the UN Watercourses Convention out of the two UN Conventions. The UNWC provides a more intricate framework compared to the UNECE Water Convention[176] and is generally more referred to in case law and legal papers.[177] Notwithstanding, this dissertation examines whether the rules within these conventions have crystallized into customary international law. Important in that respect is Rieu-Clarke and Kinna's conclusion noting that the joint implementation of both conventions is beneficial, due to their largely similar substantive norms, being the principle of equitable and reasonable utilization, the prevention of significant harm and the protection of ecosystems. Procedurally, although also similar, the UNECE Water Convention seems to have more thorough procedural requirements, whereas the UNWC maintains only basic procedural provisions, but also puts in place procedures for notification and consultation about "planned measures."[178]

The UNWC is said to reflect customary international law when it comes to its "*most fundamental obligations*," especially for these three basic principles of equitable and reasonable utilization, the obligation not to cause harm, the duty to notify and consult before planned measures.[179]

4.2.2. Berlin Rules on Water Resources

133. The following rules of soft law that prove to be interesting to study are the **Berlin Rules on Water Resources**.[180] On the 21st of August in 2004, the International Law Association (ILA) adopted the Berlin Rules on Water Resources (hereafter, Berlin Rules). The Berlin Rules are a modification - and replacement - of the 1966 Helsinki Rules.[181] This soft law instrument is made by the ILA in their objective to clarify and develop international law.[182] By drafting these rules, the ILA cooperates in

[175] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[176] R.E., VON MEDING, (2022). The grand ethiopian renaissance dam: large-scale energy project in violation of international law? LSU Journal of Energy Law and Resources, 10(1), 33-62.
[177] This is the research papers', J. Coopman, own observation.
[178] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge; Infra.
[179] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.
[180] INTERNATIONAL LAW ASSOCIATION, *Berlin Conference Water Resources Law*, 2004, https://www.internationalwaterlaw.org/documents/intldocs/ILA/ILA_Berlin_Rules-2004.pdf
[181] J., W., DELLAPENNA & J., GUPTA, (2021). "Introduction to Volume X". In Elgar Encyclopedia of Environmental Law. Cheltenham, UK: Edward Elgar Publishing; M. J., VICK, (2012). The Law of International Waters: Reasonable Utilization. Chicago-Kent Journal of International and Comparative Law, 12, 141-178.
[182] INTERNATIONAL LAW ASSOCIATION, *Constitution of the Association*, International Law Association, 2016, https://www.ila-hq.org/en_GB/documents/constitution-english-adopted-johannesburg-2016-2

codifying customary international law.[183] The Berlin Rules, the Helsinki Rules and the UNWC are the three principal legal instruments codifying customary law on non-navigational uses of transboundary rivers.[184]

4.2.3. The Cooperative Framework Agreement

134. The CFA was formed under the auspices of the Nile Basin Initiative and has been signed by six Nile riparian states as of March 2011,[185] which, according to art. 43 CFA, entails the entry into force of the Agreement.[186]

135. The CFA also establishes a Nile River Basin Commission to ensure fluent cooperation between the riparian states, which includes the notification and consultation duty on planned measures.[187]

136. All participating states to the CFA agreed upon the agreement's provisions, but one, i.e., the plausible nullification of the Nile Waters Agreements. Although not included in the final version, this matter of contention drove Egypt and Sudan to drop out of the CFA.[188] If the question of whether the existing treaty law in the Nile River Basin can effectively coexist with the CFA, is answered negatively, Egypt and Sudan's historical rights would be superseded by internationally accepted principles appointing the equitable share of water utilization, allocation of the Nile.[189]

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[183] Prologue of the Berlin Conference Water Sources Law

[184] DELLAPENNA & J., GUPTA, (2021). "Introduction to Volume X". In Elgar Encyclopedia of Environmental Law. Cheltenham, UK: Edward Elgar Publishing; In 2008 the UN general assembly also adopted a resolution on the Draft Articles on the Law of Transboundary Aquifers, composed by the International Law Commission. A transboundary aquifer can be described as a natural underground water reservoir under the territory of multiple countries. The UN Draft Articles will be left out of the scope of this research paper viewing that they apply only on transboundary aquifers and this paper limits its examination to the non-navigational utilization of transboundary rivers; INTERNATIONAL LAW COMMISSION, *Draft Articles on the Law of Transboundary Aquifers*, 2008, https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_5_2008.pdf; P., WEHLING, (2020). Customary principles of international water law. Nile Water Rights: An International Law Perspective, 31-54; G.E., ECKSTEIN, (2007). Commentary on the u.n. international law commission's draft articles on the law of transboundary aquifers. *Colorado Journal of International Environmental Law and Policy, 18(3),* 537-610; X., "Transboundary aquifers, a global outline 2021", *IGRAC 2021*, https://www.unigrac.org/stories/transboundary-aquifers-global-outline2021#:~:text=Transboundary%20aquifers%20(TBAs)%20are%20aquifers,they%20should%20have%20a%20voice.

[185]Nile Basin Initiative, "Cooperative Framework Agreement", *Nile Basin Initiative 2023*, https://nilebasin.org/nbi/cooperative-framework-agreement

[186] Art. 5 of the Agreement on the Nile River Basin Cooperative Framework

[187] Z., YIHDEGO, (2017). *The fairness 'dilemma' in sharing the nile waters: What lessons from the grand ethiopian renaissance dam for international law?*. BRILL.

[188] A., M, IBRAHIM, (2011). The nile basin cooperative framework agreement: the beginning of the end of egyptian hydro-political hegemony. Missouri Environmental Law & Policy Review, 18(2), 282-313.

[189] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.

137. Various legal principles in the CFA were extracted from the UNWC such as the principle of equitable and reasonable utilization, the obligation not to cause significant harm, the principle of protection and the conservation of the river's ecosystem.[190] However, the substance of both legal instruments is not fully the same. The CFA also incorporated the principle of subsidiarity and the community of interest in its texts.[191]

138. On May 14th, 2010, Ethiopia was the sole of three Nile Basin states that signed the CFA[192] and went on to ratify it on June 13th, 2013.[193] However, many principles that have been included in the CFA gained customary international law status[194] and hence, can be applied to Egypt and Sudan as well. Thus, the CFA will later be referred to as a tool in correctly deciphering the customs on basin-wide river usage. One of the provisions included in the CFA which has not yet obtained customary international law status is the matter of water security. To add, Egypt and Sudan's right to water security presumably could be breached in the future, due to their dependence on the GERD's downwards water flow during their dry seasons.[195] Art. 2, f) CFA defines water security as: "*the right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment*."[196] Mainly Egypt uses the Nile water for its agriculture, because there is almost no rainfall in Egypt, exempted a narrow strip along the Mediterranean Coast[197] and therefore depends on the Nile for its livelihood. The GERD takes away Egypt's right to water security, because the latter is now fully dependent on the GERD for its water flow, viewing that 85 percent of the Nile stream comes from the Blue Nile that passes through the GERD.[198] The fact that the water security principle does not possess customary international law status does not pose a problem, viewing that the absence of water means direct harm and the downstream states' water security is therefore protected by the obligation not to cause significant harm.[199]

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[190] Infra; Ibid.
[191] Z., YIHDEGO, (2017). *The fairness 'dilemma' in sharing the nile waters: What lessons from the grand ethiopian renaissance dam for international law?*. BRILL; respectively, articles 3.3 and 3.9 CFA
[192] Agreement on the Nile River Basin Cooperative Framework, in fine.
[193] Nile Basin Initiative, "Cooperative Framework Agreement", *Nile Basin Initiative 2023*, https://nilebasin.org/nbi/cooperative-framework-agreement
[194] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.
[195]Art. 14 of the Agreement on the Nile River Basin Cooperative Framework
[196] Art. 2, f) of the Agreement on the Nile River Basin Cooperative Framework
[197] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[198] Supra.
[199] R.E., VON MEDING, (2022). The grand ethiopian renaissance dam: large-scale energy project in violation of international law? LSU Journal of Energy Law and Resources, 10(1), 33-62.

139. Moreover, due to the lack of basin-wide legal engagement, Ibrahim assigns to the GERD a political utility for upper riparian states in a "counter-hegemonic strategy."[200]

4.2.4. The 2015 Declaration of principles

140. In the year 2015 the leaders of Egypt, Sudan and Ethiopia came together in Khartoum to sign the Declaration of Principles (DoP) intended to govern the GERD's construction.[201] The DoP is meant to provide a framework for the filling and operation of the GERD.[202] The DoP holds principles of conduct, such as the principle of development, regional integration and sustainability, the principle of equitable and reasonable utilization, the principle not to cause significant harm, the principle to cooperate on the first filling and operation of the dam and many more.[203]

141. Legal theorist, Darwisheh, writes in its assertion that the 2015 declaration of principles (or DoP) gave Ethiopia the right to build and fill the GERD and moreover, that the DoP had no clause assuring Egypt of its claims over the Nile utilization.[204]

142. Although the DoP is a step in the right direction reaching an agreement on the GERD, the international legal community does not perceive the DoP as fully binding upon the three basin states.

143. The DoP has not been ratified by any of its signatories, not by Egypt and Sudan nor Ethiopia, which is one of the arguments to believe the DoP has no legally binding power yet. [205]

144. Other authors however, such as von Meding, believe there is a possibility that the DoP is, in fact, enforceable between the three riparian states. The same author enumerates both favorable and negatory arguments for this stance. One of the arguments in favor of enforceability is the fact that the three Nile Basin states signed a supplemental agreement on the implementation of the DoP that confirms the states' "*sincere and full commitment {…} to adhere to the Agreement on the Declaration*

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[200] A., M, IBRAHIM, (2011). The nile basin cooperative framework agreement: the beginning of the end of egyptian hydro-political hegemony. Missouri Environmental Law & Policy Review, 18(2), 282-313.
[201] X, "Full text of 'Declaration of Principles' signed by Egypt, Sudan and Ethiopia", *Ahram Online 2015*, https://english.ahram.org.eg/News/125941.aspx
[202] T., ZERGAW, (2024). ''Mediated''Negotiation over the Grand Ethiopian Renaissance Dam: Achievement, Challenges and Prospect. *International Journal of Water Management and Diplomacy*, *1*(7), 5-35.
[203]Agreement on Declaration of Principles between The Arab Republic of Egypt, The Federal Democratic Republic of Ethiopia And The Republic of the Sudan On The Grand Ethiopian Renaissance Dam Project (GERDP), Khartoum, 5 March 2015, United Nations Environment Programme, https://leap.unep.org/sites/default/files/treaty/TRE160043.pdf
[204] H., DARWISHEH, "Egypt and the Politics of the Grand Ethiopian Renaissance Dam: An Update", *IDE-JETRO 2011*, https://www.ide.go.jp/library/Japanese/Publish/Reports/AjikenPolicyBrief/pdf/173.pdf
[205] H., DARWISHEH, "Egypt and the Politics of the Grand Ethiopian Renaissance Dam: An Update", *IDE-JETRO 2011*, https://www.ide.go.jp/library/Japanese/Publish/Reports/AjikenPolicyBrief/pdf/173.pdf

of Principles".[206] The most pressing argument on the negatory side is the one of lack of a formal process of either ratification, deposition or entry into force.[207] Since there are no conclusive answers as to whether the DoP is binding upon the three Nile Basin states, the presumption should be that the DoP cannot be considered as binding. Hence, if the rules within the DoP resonate with principles of customary international law, they are indeed applicable to the GERD conflict. The DoP can be an interpretative tool in this respect much alike the other international legal instruments that are not directly binding between the three riparian states.

145. Although von Meding herself mentioned there is ample uncertainty regarding the binding nature of the DoP, she later asserts that art. 3 of the 1902 Agreement could not have been breached by Ethiopia since the three Nile Basin states signed the DoP in 2015 which handles the GERD's construction and filling.[208] The reasoning here is that Egypt and Sudan implicitly parted with their veto power on upstream Nile constructions when they signed the DoP on the GERD's regulation. Regardless, this research paper would like to disassociate itself from this theory, because of the uncertain statute of the DoP. Since no certainty can be given on whether the riparian states are bound by the DoP, the premise of unenforceability remains and therefore, the obligations within the 1902 Agreement cannot be disregarded solely based on this argument.

146. Nonetheless, art. 18, a) of the 1969 Convention conveys the obligation not to defeat the object and purpose of a treaty prior to its entry into force:

*"A State is obliged to **refrain from acts which would defeat the object and purpose of a treaty** when: (a) it has **signed the treaty** or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;"*

147. This provision signifies that Egypt and Sudan as well as Ethiopia are still bound to not defeat the object and purpose of the 2015 Declaration of Principles concerning the GERD until asserting their intention to not become a state-party. Viewing that none of the three riparian states did the latter,[209] there are some allegations to be made towards the states' conduct. It could be said that Egypt and Sudan breached art. 10 DoP that obliges the Nile Basin States to reach an agreement without the

[206] R.E., VON MEDING, (2022). The grand ethiopian renaissance dam: large-scale energy project in violation of international law? LSU Journal of Energy Law and Resources, 10(1), 33-62.
[207] R.E., VON MEDING, (2022). The grand ethiopian renaissance dam: large-scale energy project in violation of international law? LSU Journal of Energy Law and Resources, 10(1), 33-62.
[208] R.E., VON MEDING, (2022). The grand ethiopian renaissance dam: large-scale energy project in violation of international law? LSU Journal of Energy Law and Resources, 10(1), 33-62.
[209] The latest update news sites provide for the GERD has been around the months of March and April of 2024 and do not include statements of the intention not to become party to the DoP.

intervention of a third party and can jointly request for conciliation or mediation or even refer the dispute to the Heads of state.[210] In spite of this principle, Egypt took the matter to be heard at the United Nations Security Council in June 2021, but the latter reiterated that negotiations should be guided by the African Union, [211] which, thus, makes for an internationally wrongful act. Both conditions of attributability and the breach of an international obligation (meaning to not defeat the purpose or object of a treaty) are fulfilled and constitute an internationally wrongful act under art. 2 ARSIWA.

4.3. Customary International Law on transboundary rivers

4.3.1. Introduction

148. The fact that there is no immediately enforceable agreement between all three Nile Basin states, does not mean there is no safeguard for the principles of customary law on the non-navigational utilization of transboundary rivers whatsoever. In this respect, although, they are not directly applicable, the various aforementioned legal instruments (i.e., UNWC, Berlin Rules, CFA, DoP) are useful tools when referencing to international customs.

149. Furthermore, the International Court of Justice established in the Silala River Case that the UNWC, at least in part, represents customary international law, but this does not apply to all of its provisions. Thus, the customary international law status has to and will be established for every article separately.[212]

150. What follows now is a list of the possible principles on non-navigational uses of transboundary rivers under customary international law. These principles will then be applied to the Nile Basin conflict. In order to rightly retrieve and examine said principles, this dissertation will be based on the principles applied in the Silala River case between Bolivia and Chile.

151. The source of the Silala River originates on Bolivian territory and thereafter flows on through Chile. On the 6th of June 2016, the Ministry of Foreign Affairs of Chile instituted proceedings against Bolivia because of Bolivia's previous declarations saying that the Silala River is not an international watercourse and fully belongs to the Bolivian people. Moreover, the former Bolivian president, Evo Morales, even announced that Chile would have to pay compensation for their century-long utilization

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[210] Art. 10, Agreement on Declaration of Principles between The Arab Republic of Egypt, The Federal Democratic Republic of Ethiopia And The Republic of the Sudan On The Grand Ethiopian Renaissance Dam Project (GERDP), Khartoum, 5 March 2015, United Nations Environment Programme, https://leap.unep.org/sites/default/files/treaty/TRE160043.pdf

[211] H., DARWISHEH, "Egypt and the Politics of the Grand Ethiopian Renaissance Dam: An Update", *IDE-JETRO 2011*, https://www.ide.go.jp/library/Japanese/Publish/Reports/AjikenPolicyBrief/pdf/173.pdf

[212] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614.

of the Silala River, reiterating once more that Chile has no historical rights to the Silala River.[213] Following these statements, the Republic of Chile sought the Court's jurisdiction on several alleged violations of international law by Bolivia.

152. The Silala River case is similar to the GERD dispute in the sense that both cases portray a dispute between riparian states - concerning water allocation and river constructions - who are also not a party to the UNWC, yet are bound by customary international law. Hence, customs implemented on the Silala River presumably are applicable to the Nile as well.

153. In this chapter, various substantial principles of customary international law on transboundary rivers that could be applied to the Nile Basin conflict, will be examined.

I) The protection of existing water uses;

II) The prohibition of interference with the regime of international watercourses;

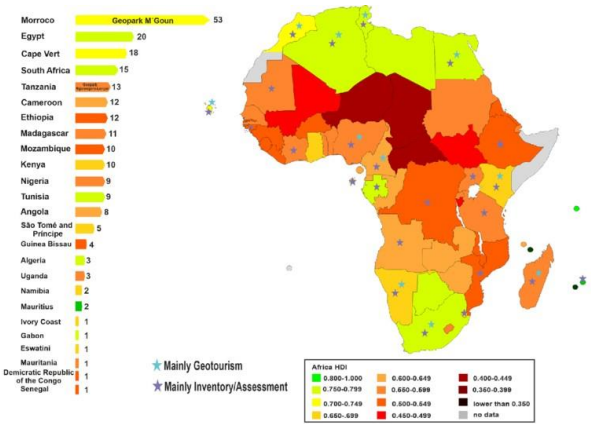
III) The equitable and reasonable utilization of water;

IV) The obligation to prevent transboundary harm;

154. Furthermore, the following procedural obligation will be reviewed:

I) The obligation to notify and consult with respect to measures that may have an adverse transboundary effect or that pose a risk of significant transboundary harm.[214]

155. As a result of a general faster and earlier development of downstream riparian states than upstream riparian states, both have very contrasting legal points of view towards the allocation of river resources. The more advanced countries will defend their prior acquired rights, while upstream countries demand developmental equity.[215]



K., NETO & M., HENRIQUES, (2022). Geoconservation in Africa: State of the art and future challenges. Gondwana Research. 110.

156. The premise that downstream riparian countries have a swifter development process than upstream ones also applies to the Nile Basin region.

[213] Institution of proceedings on 6 June 2016 by the Republic of Chile on the dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614.
[214] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614.
[215] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.

This was found in the 2020 Human Development Index (HDI).[216] Egypt belongs to the top ten most developed countries in the African continent, whereas Sudan and Ethiopia both have lesser scores (and Ethiopia the least at that), due to their respective upstream status towards downstream Egypt. Where Egypt scores 0.707 HDI, Sudan circles around 0.600 and Ethiopia around 0.500. [217] While following the Nile's course, when proceeding more upstream, the map grows darker red, which reflects a lower degree of development.

4.3.2. Substantial customary international law

4.3.2.1. Protection of existing water uses

157. As discussed earlier, Egypt and Sudan claim a great deal of historical water rights to be vested on the Nile, due to the Nile Waters Agreements. Whether these agreements still apply or if they can be applied to Ethiopia at all has been questioned and (partially) answered above. The 1959 Agreement divided up all available Nile water between Egypt and Sudan leaving no room for the other Nile riparian states' water uses.[218] Seeing that Ethiopia has a third-party status towards the 1959 Agreement, it is illogical to assume that the respective 55,5 BCM and 18,5 BCM[219] that were allocated to Egypt and Sudan are vested historical water rights. So, although existing water uses should be safeguarded, there is something to say about how to establish the existence of water uses as a status quo and what the difference is with a hydro-hegemony.[220]

158. To indicate, when Egypt was conducting the Toshka project, which was drawing water from the Nile, Ethiopia sent a *Note Verbale* on the 20th of March 1997 stating that it "*wishes to be on record as having made it unambiguously clear that it will not allow its share to the Nile waters to be affected by a fait accompli such as the Toshka project, regarding which it was neither consulted nor alerted*".[221] The latter comes to show that in many situations regarding the law on non-navigational uses of transboundary rivers, the upstream and downstream riparian states stand adversely against each other. If the entire legal landscape would agree with the concept of foreclosure of future uses,[222]

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[216] K., NETO & M., HENRIQUES, (2022). Geoconservation in Africa: State of the art and future challenges. Gondwana Research. 110. 107-113.
[217] K., NETO & M., HENRIQUES, (2022). Geoconservation in Africa: State of the art and future challenges. Gondwana Research. 110. 107-113.
[218] A. M., ONENCAN, & B., VAN DE WALLE, (2018). Equitable and reasonable utilization: reconstructing the Nile basin water allocation dialogue. *Water*, *10*(6), 707.
[219] Supra.
[220] This is a reference to Egypt's hydro-hegemony that it has established throughout the years by acclaiming itself the substantial usage of the Nile waters in the 20th century with the Nile Waters Agreements.
[221] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[222] Infra.

downstream riparians could never harm the upstream ones and every "*fait accompli*," as the Ethiopians call it, could contribute to a countries existing water use. To cite Waterbury, "*Ethiopia will suffer appreciable harm in order not to cause harm to Egypt*".[223] This well-put sentence implies that if Ethiopia were to be prohibited from ever using the Nile resources within the boundaries to not impair Egypt's 'existing water rights' (referring to their self-allocated 55,5 BCM), this would put a greater strain on Ethiopia than it would damage Egypt's interests. Hence, the difficulty lies in assessing which water uses are deserve protection under the principle of historical water use. Establishing the existing water rights, however, needs to be abstracted from the Nile Waters Agreements. While these agreements also contain provisions on water allocation, this chapter treats the existing water rights regardless of treaty law and solely based on prior water use.

159. In the U.S. two theories emerge concerning water allocation disputes: riparianism vs. prior appropriation.[224] The former being the entrusted principle for upstream riparians, while the latter coincides with the faster developing downstream riparians.[225] Riparianism applies the equitable and reasonable use principle to solve conflicting water uses, while appropriators cling on to a vast amount of water that they have used in the past and therefore claim to be entitled to in the future. [226] It can be assumed that Egypt and Sudan would support prior appropriation and Ethiopia riparianism.

160. What is more is that the existing use is only one of the criteria that denotes what a riparian states' fair share is in transboundary water resources,[227] which indicates the priority of the principle of equitable and reasonable use over prior appropriation.[228] This is evidenced by art. 6, e) UNWC that enlists "*existing and potential uses of the watercourse*" as only one of several criteria to bear in mind when assessing water allocation. [229] Therefore, the question whether Egypt and Sudan's existing water rights can prohibit the GERD's water utilization remains unanswered for now. As said above, the

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[223] J., WATERBURY, (2008). *The Nile Basin: National Determinants of Collective Action*. New Haven: Yale University Press.

[224] R., AUSNESS, (1986). Water rights, the public trust doctrine, and the protection of instream uses. University of Illinois Law Review, 1986(2), 407-438.

[225] R., AUSNESS, (1986). Water rights, the public trust doctrine, and the protection of instream uses. University of Illinois Law Review, 1986(2), 407-438.

[226] R., AUSNESS, (1986). Water rights, the public trust doctrine, and the protection of instream uses. University of Illinois Law Review, 1986(2), 407-438.

[227] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.

[228] J. D., AZARVA, (2011). Conflict on the nile: international watercourse law and the elusive effort to create transboundary water regime in the nile basin. Temple International & Comparative Law Journal, 25(2), 457-498.

[229] J. D., AZARVA, (2011). Conflict on the nile: international watercourse law and the elusive effort to create transboundary water regime in the nile basin. Temple International & Comparative Law Journal, 25(2), 457-498.

historic water rights are only one of many criteria to take into consideration when evaluating Ethiopia's plausible wrongful conduct regarding the GERD. Thus, this chapter will be incorporated into the chapter about equitable and reasonable utilization.

4.3.2.2. The prohibition of interference with the regime of international watercourses

161. The prohibition of interference with the regime of international watercourses is brought back to the two adverse theories of absolute territorial sovereignty versus absolute territorial integrity. [230]

162. When discussing a riparian states' stance on the sharing of transboundary waters, the principle of sovereignty dares to be flung around quite often. This prohibition of interference with the regime of international watercourses, also known as the Harmon doctrine, was named after a former US Attorney-General in the dispute concerning the Rio Grande with Mexico.[231] According to Harmon, the fact that the Rio Grande is inadequate to dispense all needed resources for the US as well as Mexico does not imply that restrictions can be put on the US's water usage. This would go against the United States' "*full sovereignty over its natural territory*." The absolute territorial sovereignty approach favors upstream states by striving for total freedom of decisions regardless of the impact outside its own boundaries. However, it has few followers as most global legal authors have renounced this theory. [232]

163. Accordingly, when the US acts as an upstream riparian state while disputing water usage of the Rio Grande with Mexico, it arguments absolute territorial sovereignty, meaning they can freely use the natural resources on their territory without scruples towards the downstream riparian states. On the other hand, when discussing with Canada, as a lower riparian, the US defended the idea of a more limited territorial sovereignty.[233]

164. The theory of absolute territorial integrity directly opposes the theory of absolute territorial sovereignty by affirming that states must allow rivers to follow its natural course and not divert them nor "interrupt, artificially increase or diminish its flow".[234] The latter approach entails an advantage for downstream states. This theory permits a country to use their territorial waters as long as it does not harm another state. In this viewpoint, only an upper riparian could harm a downstream riparian. As

[230] J., BRUHACS, (1993). The law of non-navigational uses of international watercourses. Dordrecht: Nijhoff.
[231] J., BRUHACS, (1993). The law of non-navigational uses of international watercourses. Dordrecht: Nijhoff.
[232] J., BRUHACS, (1993). The law of non-navigational uses of international watercourses. Dordrecht: Nijhoff.
[233] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[234] J., BRUHACS, (1993). The law of non-navigational uses of international watercourses. Dordrecht: Nijhoff.

such, this view has proven beneficial for downstream riparian states, since they always see their water usage protected, but can freely use their waters themselves. [235]

165. Legal scholar, Bruhàcs mentions that state practice is scattered throughout both legal approaches. The author names Ethiopia as an advocate for absolute territorial sovereignty and Egypt, for the opposite absolute integrity principle. What is more is that Bruhàcs states that no trace can be found in the Nile treaties of absolute territorial sovereignty. [236] The two legal models seem unreconcilable. However, this duplicity resulted in the emergence of the doctrine of limited territorial sovereignty, which lies in a shifting continuum between absolute territorial sovereignty and integrity. [237] The doctrine of limited territorial sovereignty is voiced through the principle of equitable utilization.[238] According to this doctrine, a state's discretional use of rights on its territory is limited by the principle of good neighborliness and the duty not to cause significant harm.[239] The arbitral tribunal in the Trail Smelter case[240] between the US and Canada articulated that territorial sovereignty can only be limited when significant transboundary harm has been done.[241] This precedent shows that the obligation to prevent transboundary harm warrants a limitation of a states' territorial sovereignty. Thus, the principle of limited territorial sovereignty will not be further examined and is to be incorporated in the chapter on the obligation not to cause transboundary harm.

4.3.2.3. The obligation to prevent transboundary harm

166. While art 7 UNWC and 5 CFA both hold provisions to not cause significant harm to other riparian states, these instruments are not established as legally binding for all three Nile Basin states.[242]

[235] A., SHWABACH, (1998). The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians. Texas International Law Journal, 257; E., BURLESON, (2005). Equitable and reasonable use of water within the euphrates-tigris river basin. Environmental Law Reporter News & Analysis, 35(1), 10041-10054.
[236] J., BRUHACS, (1993). The law of non-navigational uses of international watercourses. Dordrecht: Nijhoff.
[237] A., SHWABACH, (1998). The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians. Texas International Law Journal, 257.
[238] A., SHWABACH, (1998). The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians. Texas International Law Journal, 257.
[239] N., RAVICHANDRAN, (2014). Restricting Sovereignty Transboundary Harm in International Environmental Law. Environment, Law and Society Journal (ELSJ), 2, 91-104.
[240] Reports of International Arbitral Awards, Trail smelter case (United States, Canada), 16 April 1938 and 11 March 1941 Vol. III, 1905-1982.
[241] N., RAVICHANDRAN, (2014). Restricting Sovereignty Transboundary Harm in International Environmental Law. Environment, Law and Society Journal (ELSJ), 2, 91-104.
[242] This is a referral to the fact that only Ethiopia ratified the CFA and none of the three Nile Basin states (Egypt, Sudan or Ethiopia) ratified the UNWC; Supra.

Nonetheless, the duty not to cause significant harm is customary international law.[243] Hence, the lack of ratification on behalf of Egypt, Sudan and Ethiopia is no issue.

167. The principle to not cause significant harm entails that it is the duty of riparian states to share freshwater resources and to not cause significant harm to other riparian states by doing so.[244] However, an activity that causes significant harm does not, on its own, initiate prohibition. Notwithstanding, sometimes an equitable and reasonable sharing of resources means significant harm to other riparian states since international rivers might not have enough capacity to harbor all Basin states' needs. Notable is that such harm could not on its own conclude an internationally wrongful act.[245] In the commentary of the Berlin Rules it is stated that use of resources by a riparian state cannot be prohibited solely based on the foreclosure of future uses. Thus, present water uses do not become vested rights towards the water use of slower developing countries that start increasing the exploitation of its resources.[246]

168. Although the principle not to cause significant harm is mostly favored by downstream states, this does not exclude them from the narrative.[247] **While it is often believed that solely upstream states can cause harm by affecting the water flow's quantity or quality, downstream states' conduct can, in this respect, not be neglected. Downstream states, on their part, can cause harm by "*foreclosing their future uses of water through the prior use of, and the claiming of rights to such water*".[248]** Downstream states assume their historical water rights are protected under the harm principle and that therefore, upstream states are prohibited to enable upstream river construction, as it would cause them harm. Notwithstanding, upstream riparian states advocate more for the principle of equitable and reasonable utilization.[249] **Therefore, the examination of possible caused harm in the Nile Basin Region should not be limited to Ethiopia alone and includes Sudan and Egypt as well.**

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[243] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[244] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[245] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[246] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[247] Z., YIHDEGO, (2017). *The fairness 'dilemma' in sharing the nile waters: What lessons from the grand ethiopian renaissance dam for international law?*. BRILL.
[248] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[249] Ibid.

169. That the GERD's construction causes harm to downstream states seems undisputable. The GERD has a lot of harmful effects i.e., on the environment, climate, sedimentation levels, downstream water security and so on. The question remains, however, whether the threshold for "significant" harm has been achieved by the GERD's construction.

170. **Therefore, it is important to agree upon the standard to which possible harm is assessed.** In this respect, although art. 7 UNWC and art. 5 CFA mention the threshold for the harm being of significant matter, this might not apply universally to all international river conflicts. It does not need a reminder that the riparian states in question are solely bound on the basis of customary international law, because they are not parties to the UNWC, nor of the CFA (except for Ethiopia).[250] The harm principle, as said above, has gained customary international law status, but the threshold for the obligation to not cause harm might differ between cases and therefore, its status still has to be examined. This idea is uttered by the Court in the Silala case, but was not applied, due to a lack of diverging views on the matter by Chile and Bolivia.[251]

171. This dissertation follows the Silala River precedent and will take on the same threshold. , there is no definition or guidance about what constitutes as a significant amount of harm. The lack of clear definition of significant harm complicates the analysis of possible wrongful conduct the Nile Basin states. As for Ethiopia, for example, it would not suffice to simply measure the percentage of flow diversion caused by the GERD. [252]

172. Still on the subject of thresholds, the Court stated in the Silala River case that the "Parties also agree that the obligation to prevent transboundary harm is an **obligation of conduct*[253]*** and not an obligation of result, and that it may require the notification of, and exchange of information with, other riparian States and the conduct of an environmental impact assessment."*[254]* The riparian states have the obligation to use all disposable means to avoid activities that would cause "**significant damage to**

[250] Supra.
[251] As noted above, if the Court
[252] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[253] The same conclusion was drawn in the pulp mills case concerning the obligations to co-ordinate measures to avoid changes in the ecological balance and to prevent pollution and preserve the aquatic environment, which both fall within the scope of the duty not to cause harm. Both were classified as obligations of conduct; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 77-78, para. 186-192.
[254] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614.

the environment of another state". [255] In other words, the duty not to cause harm requires states to exercise their due diligence to "avoid, minimize and mitigate harm."[256]

173. Based on the above, the following conditions for the "harmful conduct" principle can be deducted:

I) A harm has been caused;

II) The harm is of significance; Significant harm is described as "a real impairment of a use, established by objective evidence."[257] However, the mere inconveniences or disturbances that are expected to be endured along the lines of good neighborliness are to be excluded.[258]

III) The obligation to prevent transboundary harm is an obligation of means ("best effort"), meaning that all disposable means should be implemented.

174. The difficulty with these conditions is that the term "harm" is not defined in the UNWC. Thus, in order to examine whether a riparian state caused significant transboundary harm its **due diligence** needs to be observed. It must be examined whether a riparian state used all available means to stop the harm.

175. As will be evidenced by the following arguments, it is debatable whether Ethiopia took all appropriate measures to prevent the causing of significant harm to other Basin States with regard to the GERD.

First, the announcement of the construction of the GERD in 2011 by Ethiopia was not preceded by negotiations concerning the use of waters and the possible effects the GERD could have on other riparian states' ecosystems.[259] The lack of prior negotiations or acknowledgement by other riparian states raises doubts about the Ethiopia's intention of preventing significant harm to either Egypt or Sudan.

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[255] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614.
[256] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[257] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[258] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[259] Supra.

Second, Ethiopia should eliminate or mitigate harm done by the GERD to other riparian states and where appropriate, should discuss compensation for it. Although Ethiopia engaged in discussions with Egypt and Sudan under the NBI, it did not suspend the GERD's construction upon Egypt's request when the IPoE suggested further investigation on the possible impact of the GERD on Egypt and Sudan and no agreement could be reached on the appointment of its panel members.[260] The further investigation referred to here also resonates with what the Court in the Silala River case called the "*environmental impact assessment*", that should be included in a state's due diligence.

176. Moreover, the ILC's Draft Articles on Prevention of Transboundary Harms[261] poses four criteria to establish the causing of significant transboundary harm:

i) The acts are not prohibited by international law;

ii) They are planned or carried out in the jurisdiction of one state;

iii) There is a risk of the activities causing significant transboundary harm; and

iv) Significant transboundary harm is a '*physical consequence*' of these activities.[262]

177. The fact Ethiopia did not fulfill its proper due diligence before initiating the GERD project means an internationally wrongful act, as defined in art. 2 ARSIWA, as the lack of proper due diligence is attributable to Ethiopia and forms a breach of the international obligation to prevent the causing of significant transboundary harm. Certain is the fact that Ethiopia caused significant harm to Egypt and Sudan by their unwarranted construction of the GERD, yet undeniable is the harm Egypt and Sudan can cause by their foreclosure of future uses. However, while the GERD's construction clearly fulfills all four criteria to establish significant harm, the foreclosure of future uses by Egypt and Sudan does not incite physical consequences, but rather legal ones. Thus, the foreclosure of future uses of Nile water rights does not directly entail an internationally wrongful act, but will be delegitimized in the following chapter on equitable and reasonable use.

178. Ultimately, whether Ethiopia caused significant transboundary harm to the other riparian states, remains uncertain.

179. Legal expert, Mengesha, proposes that, in order to provide more clarity on the condition for caused harm, the Nile Basin states reach an agreement on water allocation. Then, the states could

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[260] Supra.

[261] INTERNATIONAL LAW COMMISSION, Yearbook 2001, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf

[262] N., RAVICHANDRAN, (2014). Restricting Sovereignty Transboundary Harm in International Environmental Law. Environment, Law and Society Journal (ELSJ), 2, 91-104.

measure the transboundary harm based on the extent in which their water share is not being met.[263] However, as seen in the Nile Basin region's treaty history, Egypt, Ethiopia and Sudan have come to be stuck in their own adverse interests and it would prove difficult to come to an agreement between these states on the use of the Nile waters.

180. Whether every harm done by a basin state is eligible for compensation will be discussed in a later chapter concerning the relationship between the principle of equitable and reasonable use and the obligation to prevent significant harm.

4.3.2.4. Equitable and reasonable use of transboundary watercourses

181. Since the Helsinki Rules of 1966, equitable and reasonable utilization of resources has been the guiding principle of international water law.[264] The latter has been confirmed by the International Court of justice in the Gabcikovo-Nagymaros case.[265] Furthermore, in the Silala case the International Court of Justice states that "under customary international law, every riparian state has a basic right to an equitable and reasonable sharing of the resources of an international watercourse."[266] Thus, the principle of equitable and reasonable utilization of the waters, concluded in art. 6 of the UNWC, is customary international law, according to the International Court of Justice.

182. The principle of equitable and reasonable use is defined as "*the allocation of rights in the uses and benefits of shared water resources on the basis of a distributive conception of equity having regard to all relevant factors*."[267] Thus, the basin states receive rights and benefits over the shared watercourse in proportion to what they each need.[268]

183. In this respect, all three the Basin states' needs are listed once more:

184. Egypt fears an intrusion into its water security by the construction of the GERD and it wants to maintain its self-acclaimed historical rights within the Nile Waters Agreements. Whereas Egypt's stance seems quite clear, the Sudanese view is likely to be more nuanced.[269]

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[263] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[264] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.
[265] S. C., McCAFFREY, (2001). The law of international watercourses: non-navigational uses, second edition. Oxford: Oxford university press.
[266] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614.
[267] O., McINTYRE, (2017). Water, law and equity. *The Human Face of Water Security*, 45-70.
[268] O., McINTYRE, (2017). Water, law and equity. *The Human Face of Water Security*, 45-70.
[269] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.

185. Sudan would at first glance benefit from the dam. The GERD would regulate water flow from the Nile and it would enable stable irrigation,[270] but, due to a Sudanese-Ethiopian border dispute, Sudan retracted its support for the GERD and once more, relies on its historical water rights stemming from the Nile Waters Agreements.[271]

186. Lastly, Ethiopia hopes for the GERD to enrich its growing population by being the first and largest green energy power in North-East Africa and wishes to claim its fair share in the Nile water resources.[272]

187. Justice Holmes states that when rivers stream through multiple sovereign states it would be improper to ask of upstream states to halt their utilization of the river as much as it would be improper to allow them absolute territorial sovereignty and therefore, to neglect the needs of downstream states.[273]

188. There are two basic segments under the principle of equitable and reasonable utilization: equality[274] and mutually acceptable arrangements.[275]

189. What falls under the scope of equity is the community of interest of riparian states. When the Permanent Court of Justice (hereafter: Permanent Court) perceives the Versailles Treaty as too ambiguous in the River Oder Case in 1929, the Court grasps back to "*principles governing international fluvial law*" and moreover, the principle of a community of interest of riparian states.[276] The concept of a community of interest is based on a common legal right between riparian states of equality in the "use of the whole cause of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others".[277] The notion of equality of right is the underlying fundamental

[270] D. Y., MESSELE, (2021). The mystery of the gerd negotiations: from coercion to obligation of treaty conclusion. Mizan Law Review, 15(2), 523-542.
[271] Supra.
[272] Ibid.
[273] S. C., McCAFFREY, (2001). The law of international watercourses: non-navigational uses, second edition. Oxford: Oxford university press.
[274] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.
[275] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[276] O., SPIERMANN, (2003). permanent court of international justice. Nordic Journal of International Law, 72(3), 399-418; Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P. C. I. J., Series A, No. 23, p. 27.
[277] Ibid.

principle of equitable and reasonable utilization[278] and therefore, the community of interest principle is reconcilable with equitable and reasonable uses.

190. Where the Permanent Court in the River Oder Case oversaw the community of interest in navigational use of a transboundary river, the International Court of Justice later strengthened and broadened this principle in the Gabcikovo-nagymaros case to non-navigational uses as well. The Court further notes that the adoption of the UNWC in 1997 adds to the development of the customary international law status of this principle.[279]

191. The Helsinki Rules, the UNWC and the Berlin Rules are the three principal legal instruments codifying customary law on non-navigational uses of transboundary rivers.[280] Due to the fact that there are no specific guidelines on cooperation and resource sharing between all three Nile Basin states[281] (e.g. binding regional agreements that outline detailed obligations concerning the Nile water allocation) the analysis of the Nile Basin states' equitable and reasonable use will have to happen through multiple criteria provided by aforementioned legal instruments reflecting customary international law.

192. Art. 6 UNWC and art. 13 Berlin Rules provide the following criteria:

1. Geographic, hydrographic, hydrological, climatic, and ecological factors
2. Social and economic needs
3. Population dependency on the watercourse
4. Effects of water usage in one state on other states
5. Both existing and potential uses of the watercourse
6. Conservation, protection, development, and economy of water resources
7. Availability of alternatives to planned or existing uses

[278] S. C., McCAFFREY, (2001). The law of international watercourses: non-navigational uses, second edition. Oxford: Oxford university press.
[279] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 56, para. 85; A., RIEU-CLARKE, & R., KINNA, (2014). Can two global UN water conventions effectively co-exist? Making the case for a 'Package Approach'to support institutional coordination. *Review of European, Comparative & International Environmental Law*, *23*(1), 15-31.
[280] DELLAPENNA & J., GUPTA, (2021). "Introduction to Volume X". In Elgar Encyclopedia of Environmental Law. Cheltenham, UK: Edward Elgar Publishing.
[281] F., AMDETSION, (2012). Where water is worth more than gold: addressing water shortages in the middle east & africa by overcoming the impediments to basin-wide agreements. SAIS Review of International Affairs, 32(1), 169-183.

8. The importance of sustainability in proposed or existing uses

9. Minimization of environmental harm[282]

193. It should be noted that there is no hierarchy between the listed criteria.[283] In theory, each criteria should be weighed separately according to their *gravitas* in the given situation. Art. 10, 2) *in fine* UNWC indicates, however, that a bit more weight is accorded to the "requirements of human vital needs", such as presumably the population's dependency on the watercourse.[284]

194. Moreover, the list of criteria in art. 6 UNWC is non-exhaustive[285] and it can therefore be supplemented. Art. 4, 2), h) and i) CFA[286] *juncto* art. 3, h) and i) DoP respectively include the **riparian states' contribution of water to the Nile** and the **"*extent and proportion of the drainage area in the territory of each Basin State***" into the mix of circumstances to take into account when assessing the riparian states' fair share, while art. 6 UNWC keeps quiet on the subject [287]

195. The effects of the use of the Nile by one riparian state on another riparian state,[288] should be measured against the possible positive consequences this use might have. [289] Thus, in this case, the GERD's negative effects need to be outweighed against the positive ones, with the latter mostly being the defiance of the Ethiopian population's poverty by generating green energy. While this is a most honorable cause, the GERD not only has a series of detrimental hydrological, climatic and ecological consequences,[290] but also could impair downstream states' water security.[291] Sedimentation levels in downstream reservoirs will be alleviated by the GERD,[292] while also altering the Nile's microclimate. [293]

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[282] The eight and nineth criteria are an addition to the ones enumerated in art. 6 UNWC and stem from art. 13, 2), h, i) of the Berlin Rules.

[283] D., GOAD, (2020). Water law be dammed?: how dam construction by non-hegemonic basin states places strain on the customary law of transboundary watercourses. American University International Law Review, 35(4), 907-940.

[284] O., McINTYRE, (2017). Water, law and equity. *The Human Face of Water Security*, 45-70.

[285] D. Z., MEKONNEN, (2017). Declaration of principles on the grand ethiopian renaissance dam: some issues of concern. Mizan Law Review, 11(2), 255-274.

[286] A. M., ONENCAN, & B., VAN DE WALLE, (2018). Equitable and reasonable utilization: reconstructing the Nile basin water allocation dialogue. *Water*, *10*(6), 707.

[287] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.

[288] i.e., fourth criteria

[289] i.e., second criteria

[290] i.e., first criteria

[291] i.e. third criteria; Especially Egypt relies greatly on the Nile for its water supply, namely more than 90 percent; DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS: SUSTAINABLE DEVELOPMENT, "Egypt, Progress on Achieving SDG 6", *UN VNR Report Egypt* 2021, https://sdgs.un.org/basic-page/egypt-34124

[292] W., ABTEW, & S., B., DESSU, (2019). *The grand Ethiopian renaissance dam on the Blue Nile*. Dordrecht, Netherlands: Springer International Publishing.

[293] M., SCHOETERS, (2013). An analysis of a big dam project: the Grand Ethiopian Renaissance Dam, Ethiopia. *Unpublished Mastersthesis. Netherlands: Ghent University*.

The GERD's reservoir could result in an increase in emissions of greenhouse gasses with risks to water quality, wildlife, vegetation and biodiversity.[294] Another argument in favor of the GERD can be based on criteria number five, which enlists the existing and potential uses of the Nile. Viewing that both Egypt and Sudan have built dams on the Nile, it seems unreasonable to deny the same to Ethiopia, just because of its upstream geographic location. Nonetheless, downstream states can invest in desalinization for fresh water and install water-saving drip irrigation together with many other measures to limit the harmful effects of the GERD.[295] The latter also has to be taken into account when assessing the effects of Ethiopia's water utilization on other Basin states, because, if there are mitigating circumstances to the GERD, they need to be considered as well. Ethiopia is not the only basin state that should adjust to the concurring needs for the Nile water resources.

196. With the former in mind, an overall consensus can be established: the unilateral construction of the GERD might not constitute an absolute breach of the equitable and reasonable utilization principle, but rather goes against the proportional character of one state's 'allowed' Nile utilization. As mentioned above, the **proportionality principle** is inherent to the equitable and reasonable use of transboundary rivers and can also be retrieved from multiple of the above listed criteria, such as 7, 8 and 9.

197. Salman voices a similar principle and names it the 'avoidance of unnecessary waste.'[296] Though the GERD might bring a lot of benefits including closing the poverty gap or providing neighboring countries with electricity in times of a deficit,[297] it could be argued that the GERD takes part in unnecessary waste. The GERD has been constructed to fit the hydropower capacity of 6000 MW, making it the largest hydropower plant in Africa and much larger than the Aswan High Dam in Egypt. Ethiopia expects to export most of its electricity to neighboring countries. [298] The downstream riparian states mainly fear for the effects the GERD will have on the Blue Nile, because the dam has a reservoir almost 1.3 times the volume of the annual discharge of the Blue Nile.[299] The latter makes one doubt whether such a large project might constitute an unnecessary burden to downstream states.

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[294] M., SCHOETERS, (2013). An analysis of a big dam project: the Grand Ethiopian Renaissance Dam, Ethiopia. *Unpublished Mastersthesis. Netherlands: Ghent University*.

[295] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.

[296] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.

[297] Supra.

[298] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.

[299] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.

Moreover, one doubts whether there were more proportional alternatives to the current design of the GERD. The reservoir's capacity of 74 BCM receives much international critique naming it "*technically unnecessary and economically irrational*"[300].

198. While the peak water flow rate of the Blue Nile is 5,663 m^3/sec, the average flow rate is around 2,350 m^3/sec. After completion of the GERD's filling after a period of 5 years, at average flow rate, the dam's reservoir would only be able to refill at a slower rate of 1,456 m^3/sec for a sustained refilling during summer with a consistent power output. Following this hypothesis, the GERD would then provide 2,100 MW, which is the same as for the Aswan High Dam. However, the GERD has been designed to annually provide 6,000 MW, which seems very ambitious.[301] The establishment of energy trade contracts prior to generating electricity is also essential to the GERD's success. It has been recognized by Ethiopia it plans to sell its surplus of energy to its neighboring countries.

199. Ethiopia seems to have overestimated the size of the GERD, because they did not adjust to the slower refill rate and therefore did not need as big of a dam as they have now. As a result of this overestimation, Ethiopia might be left with an energy surplus, which it cannot sell to its neighbors, due to the lack of prior made energy trade contracts. Altogether, this will cause harm to the downstream states whatsoever.[302]

200. While the GERD as a concept might not breach the principle of equitable and reasonable use, the immense size and operation strategy of the GERD might harm other states in a disproportional way. Thus, the GERD might violate the equitable and reasonable use of the Nile to the extent that it surpasses the limits of proportionality between Ethiopia's needs and those of Egypt and Sudan.

4.3.2.5. Relationship between equitable and reasonable use and the obligation to prevent significant harm

201. Many authors have already described the difficult relationship between the principle of equitable and reasonable utilization and the obligation to prevent significant harm.[303] The differing views on the weight to be given to both of these principles is also one of the reasons why it took more than twenty

[300] R., TAWFIK, (2015). The declaration of principles on Ethiopia's Renaissance dam: a breakthrough or another unfair deal. *German Development Institute, Bonn*.
[301] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.
[302] i.e., fourth criteria; Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.
[303] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.

years to establish the UNWC.[304] The priority of either one of these principles had been studied by the Sixth Committee of the United Nations (also known as the Legal Committee) and they finally stroke an equilibrium with art. 7, 2) of the UNWC. This article refers to the articles 5 and 6 of the UNWC, which contain the principle of equitable and reasonable utilization. If significant harm has been done to another riparian state, all the suitable and necessary measures need to be taken in accordance with the principle of equitable and reasonable use. Art. 7, 2) UNWC refers to the principle of equitable and reasonable utilization and accounts for the fact that no upper riparian state should prevent the causing of harm to downstream states to the extent that it would harm itself.[305] Be that as it may, most international law experts found that within the UNWC the duty to not cause harm is subordinate to the principle of equitable and reasonable utilization of resources.[306] Moreover, art. 7, 2) UNWC suggests that the causing of harm in some occasions could be endured, if there is a proper possibility to compensation.[307]

202. There are multiple theories on how the principle of equitable and reasonable use and the no-harm principle interact. The international legal community seems to agree that the obligation to not cause significant harm is subordinate to the equitable use principle.[308] This is also viewed in the 1966 Helsinki Rules, which reflect customary international law. The equitable and reasonable use was the guiding principle of the Helsinki Rules. [309]

203. In the Gabcikovo-Nagymaros case, the Court highlights the priority of equitable and reasonable utilization over the obligation not to cause harm and links this concept to equality between riparian states.[310]

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[304] J. D., AZARVA, (2011). Conflict on the nile: international watercourse law and the elusive effort to create transboundary water regime in the nile basin. Temple International & Comparative Law Journal, 25(2), 457-498.

[305] Art. 5 CFA holds the same reconciliation between these two principles by referring to art. 4 CFA of equitable and reasonable utilization.

[306] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.

[307] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.

[308] Z., YIHDEGO, (2017). *The fairness 'dilemma' in sharing the nile waters: What lessons from the grand ethiopian renaissance dam for international law?*. BRILL; F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.

[309] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.

[310] Ibid.

When a state's right to an equitable and reasonable us is being compromised, the Court states this can also lead to the causing of harm to this state, because the equitable and reasonable use is a basic right.[311]

204. The latter statement highly contravenes the theory foreclosure of future uses.[312] Due to the division in the law on non-navigational uses of transboundary rivers between downstream and upstream states, a legal tradition emerged where downstream states build their river claims on historically acquired rights and the obligation not to cause harm to evade the equitable and reasonable sharing of resources with upstream states. This legal strategy is also known as the "foreclosure of future uses".[313]

205. The reconciliation of both principles is also confirmed by the Court in the following statement in the Silala River case:

"In the present case, under customary international law, the Parties are both entitled to an equitable and reasonable use of the waters of the Silala as an international watercourse and obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party."[314]

US Supreme Court Justice, Oliver Wendell Holmes Jr., said "*your right to swing your arms ends just where the other man's nose begins*."[315] An analogy can be made with the relationship between equitable and reasonable use and the obligation to prevent significant harm. A balance must be struck between the proper utilization of resources that might theoretically belong to a riparian state without causing significant harm to other riparian states. The Court states that the principle of equitable and reasonable utilization of resources implies a right, but also an obligation for riparian states. The entitlement to a states' fair share ceases to exist where it exceeds its limits and deprives other states

[311] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.
[312] Supra.
[313] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[314] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614.
[315] X, "It's all about you and everyone around you", *The Riverdale Press 2021*, https://www.riverdalepress.com/stories/its-all-about-you-and-everyone-around-you,75777

of their fair share in resources,[316] which is also reflected in the principle of **good neighborliness**. Under customary international law, the "exercise of a right may not affect the right of a neighbor."[317]

206. To make up this balance between principles the International Court of Justice stated that there needs to be a harmony of "*the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource.*"[318] Thus, to find a balance in the varied interests between the Nile Basin states one must find the balance between these two principles, a concept under customary international law that has been codified by the UNWC.[319] When assessing whether a riparian state has caused significant harm to another riparian, it should not limit itself to considering only the criteria under this principle, but also expand to the ones under the principle of equitable and reasonable utilization.[320]

207. The priority of the equitable and reasonable use principle above the no-harm principle signifies that an abstraction needs to be made between two situations: one where the harm is caused by an act that does not exceed the boundaries of the equitable and reasonable share in the transboundary river and one that does. The latter, without mitigating circumstances, is forbidden under customary international law, the UNWC and the CFA,[321] and thus, contains an internationally wrongful act.

208. As seen above, Ethiopia breached the international law on non-navigational uses of transboundary rivers by causing disproportional harm to the downstream states that surpassed the limits of their equitable and reasonable share in resources. Furthermore, Ethiopia breached the obligation not to cause significant transboundary harm by not properly executing due diligence. Viewing that the lack of proper due diligence contributed to the disproportionate approach around the GERD, it cannot be concluded that the harm caused remained within the boundaries of Ethiopia's equitable and reasonable use and thus, harm caused cannot be excused.

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[316] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614.
[317] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[318] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 74, para. 177.
[319] F., ROCHA LOURES & A., RIEU-CLARKE, (2013). The UN Watercourses Convention in force: strengthening international law for transboundary water management. Abingdon, Oxon: Routledge.
[320] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[321] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334; Keep in mind that the duty not to cause harm is an obligation of conduct and when due diligence is properly executed the state in question should not be in the wrong; Supra.

209. Although with regard to the GERD, Egypt and Sudan did not breach the law on non-navigational uses of transboundary rivers, the foreclosure of future uses based on their historical rights has been refuted. The foreclosure of future uses cannot be seen as impairing other riparian states their equitable and reasonable share in the Nile waters.

4.3.2.6. Preliminary conclusion

210. The substantial customs on non-navigational uses of transboundary rivers are centered around two principles: the equitable and reasonable use and the obligation not to cause harm. The fact these principles embody ,respectively, the existing water uses and limited territorial sovereignty illustrates this as well. While both equitable and reasonable use and the obligation not to cause harm hold customary international law status, ultimately the first deserves priority.

211. The International Court of Justice confirmed this conclusion in the Gabcikovo-Nagymaros and Silala River case by going against the principle of foreclosure of future uses and awarding riparian states their own proper use of the rivers as long as it remains within the boundaries of their fair share in resources. The harm caused by this use can either be deemed insignificant, thus, resulting in no penalty, or significant enough to institute compensation. Hence, the obligation not to cause significant harm will only be breached when outside of the boundaries of the equitable and reasonable use.

212. As was explained above, the GERD's construction on the Blue Nile, in theory, might not conclude a breach of the equitable and reasonable use, but rather goes against the limitations of proportionality. The enormous capacity of the GERD might lead to an overproduction of energy. Given the fact that the GERD also has a lot of harmful effects, i.e., on the environment, climate, sedimentation levels, downstream water security, it could be questioned whether the sheer size of the project is unnecessarily big. This could mean a breach of the equitable and reasonable use principle and thus, would result in significant harm to the downstream states Egypt and Sudan. Therefore, the lack of proportionality in the approach towards the GERD is an internationally wrongful act on behalf of Ethiopia.

4.3.3. Procedural customary international law

4.3.3.1. Obligation to notify and consult

213. The last customary obligation that will be discussed in this dissertation is the duty to notify and consult and is the only principle of procedural nature.

214. In the Silala River case the International Court of Justice emphasizes the importance of procedural rights by citing the following paragraph from the Pulp Mills case: "*by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the*

plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations".[322]

215. The International Court of Justice concludes in the Silala River case that art. 11 UNWC is believed to have no customary international law status, but art. 12 UNWC does.[323] Thus, the "*obligation to exchange information on planned measures"*[324] under art. 11 UNWC will not be revised in this chapter.

216. The obligation described within art. 12 UNWC is the duty to notify and consult the other riparian state concerning any planned activity that could pose a risk of significant harm to that state. The obligation to notify and consult is of customary law and thus, will be further examined in this chapter.

217. When planning an activity with potential adverse effects to the environment of another state the riparian state has to perform an environmental impact assessment in order to establish the degree of possible transboundary harm. If the impact assessment states there is a risk of significant transboundary harm, then the riparian state is obligated to "*notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk."*[325]

The threshold for this obligation is **the possible capability of a state activity to produce "*harmful effects of a certain magnitude***."[326]

Thus the duty to notify and consult applies when there is a risk of "*significant transboundary harm*."[327]

218. Many downstream riparian states believe that, due to the fact that only upstream countries could cause harm to other riparian states and not vice versa, the notification and consultation duty does not

[322] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 77-78, para. 186-192.
[323] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614; R.E., VON MEDING, (2022). The grand ethiopian renaissance dam: large-scale energy project in violation of international law?. LSU Journal of Energy Law and Resources, 10(1), 33-62.
[324] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614
[325] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 45, para. 104.
[326] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. *Reports 2022*, p. 614
[327] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 45, para. 104.

apply to them.[328] If none of their planned activities could cause harm to upstream countries (because they could never harm upstream countries), there would be no need for notification nor consultation on their part. However, this logic has been refuted earlier[329] and this means that all riparian states, up – or downstream, have the same obligation to notify and consult when planned measures pose a risk of harm. The Helsinki Rules apply this procedural obligation to notify and consult to all riparian states without any exemptions with the words: "*A state, regardless of its location in a drainage basin* {…}."[330] The latter statement has been confirmed by state practice composed in art. 4 of the Senegal River Water Charter where it is provided that the duty to notify and consult is an obligation for all riparian states, including the downstream riparian states.[331]

219. Regardless of this Basin-wide duty to notify and consult, Egypt has in the past neglected this duty when building the High Aswan Dam.[332] However, the obligation to notify and consult is not based on reciprocity and therefore, Ethiopia cannot use another Nile Basin state's negligence to disregard its own duties.[333] Therefore, it has to be ascertained whether Ethiopia fulfilled its obligation to notify and consult both Egypt and Sudan on the construction of the GERD.

220. In May 2011, Ethiopia proclaimed to deliver the GERD's blueprints to Egypt and Sudan in order to examine its impact on the downstream riparian states.[334] This may seem as a correct fulfillment of the notification obligation, but when looking at the timeline, it is noticeable that Ethiopia's efforts to involve Egypt and Sudan in the GERD's construction process is more *pro forma* than a genuine attempt. It is noted that no mutual consultation occurred between the three Nile Basin states before the GERD's construction.[335] The Ethiopian Government conducted surveys in October 2009 and August 2010. Not

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[328] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[329] Supra; The priority of the equitable and reasonable use principle incites that each riparian state can utilize the Nile as they please, if it remains within the boundaries of it. A utilization within the boundaries of the principle of equitable and reasonable use does not automatically lead to a breach of the no-harm principle.
[330] Art. XXIX of the CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES Helsinki, 17 March 1992", *United Nations Treaty Series* 2001, 269-288.; S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[331] S. M. A., SALMAN, (2010). Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses. *Water International*, *35*(4), 350–364.
[332] Z., MENGESHA, (2014). Application of the duty not to cause significant harm in the context of the nile river basin. Bahir Dar University Journal of Law, 4(2), 284-334.
[333] Z., YIHDEGO, (2017). *The fairness 'dilemma' in sharing the nile waters: What lessons from the grand ethiopian renaissance dam for international law?*. BRILL.
[334] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.
[335] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.

many months later, the GERD's design was presented in November 2010 and was only revealed to the public in March 2011.[336] If studies on the downstream repercussions of the GERD were already being conducted in the year of 2009, one can wonder why Sudan and Egypt were only informed in the year of 2011. To hand over the GERD's blueprints in May 2011 after already having decided upon its design and after Ethiopia started its construction, seems rather late for Egypt and Sudan to make a structural impact on the GERD. It could be questioned whether Ethiopia intents to adjust the GERD, if studies would assess the GERD's effects on downstream states negatively.[337]

4.3.4. Preliminary conclusion

221. The entirety of the customary international law on non-navigational uses of transboundary rivers comes down to the waging gap in legal tradition between upstream and downstream states. This is because of the faster development of downstream riparian states, unlike upstream riparian states who only just now started demanding a fair share in natural resources within their territory.

222. This gap in legal tradition between upstream and downstream states is well demonstrated throughout this chapter.

223. In the theory of existing water usage, upstream states support riparianism and downstream states support prior appropriation. Downstream and upstream states also have diverging views on the territorial sovereignty approach. While upstream states advocate for absolute territorial sovereignty, downstream states advocate for absolute territorial integrity. The theory on limited territorial integrity lies between the two as a more nuanced middle ground. The biggest conflict in theories resides in the principle of equitable and reasonable utilization and the obligation not to cause significant harm. However, narrated by many authors as a tricky relationship, the priority of the equitable and reasonable use principle has been proven, while the duty not to cause significant harm is one of the criteria to consider when assessing the Nile riparian states' fair share of resources.

224. Hence, the essence of the substantial norms of customary international law on non-navigational uses of transboundary rivers lies in the principle of equitable and reasonable use.

225. Although it was established that downstream states Egypt and Sudan would not be able to foreclose the future use of Ethiopia's Nile River construction, (and that this would mean a use by Egypt and Sudan of the Nile that exceeds the boundaries of their own equitable and reasonable share), its is

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[336] Y., YIHDEGO, A., KHALIL & H. S., SALEM, (2017). Nile River's basin dispute: perspectives of the Grand Ethiopian Renaissance Dam (GERD). *Glob. J. Hum. Soc. Sci*, *17*(4), 1-21.
[337] HALAWA, O., "Ethiopia's Renaissance Dam: What options are left for Egypt?", *Horn Affairs 2016,* https://hornaffairs.com/2016/03/12/ethiopias-renaissance-dam-options-left-egypt/

questioned whether Ethiopia's GERD-project remained within the equitable and reasonable boundaries. A case can be made for the unnecessary and disproportionate size and structure of the GERD.

226. The obligation to notify and consult was the sole procedural custom included in this dissertation, but was certainly not less important. Although there are examples of when the other riparian states did not comply with the notification and consultation principle in the past,[338] the principle should be taken into account, without any reciprocity being required. Ethiopia cannot reject the applicability of this obligation, based on the fact that it has not always been respected by other states either. As has been demonstrated above, Ethiopia might have breached the obligation to notify and consult, given the late timing of it.

[338] Such as the Egyptian Aswan High Dam

5. HIERARCHY BETWEEN HISTORICAL RIGHTS AND CUSTOMARY INTERNATIONAL LAW

5.1. Introduction

227. International treaty law derives its binding force from consent of states. Thus, third party states that have never expressed their will to be bound will not be bound of the sole basis of a treaty.[339] Important to keep in mind, in this respect, is the "*Pacta tertiis nec nocent nec prosunt"* principle, which signifies that a state cannot be bound by a treaty in which it does not take part.[340]

228. Consequently, towards third-party states the hierarchical question is not in play.[341] This already takes the 1929 and 1959 Agreement out of the equation when examining rights and obligations between **all three Nile Basin states**. As said earlier, towards these two Nile Waters Agreements, Ethiopia holds a third-party status and therefore is not bound by them at all.

229. Nevertheless, this is without prejudice to the relationship between Egypt and Sudan concerning their rights on the Nile waters. Between them, the last two Nile Waters Agreements are still intact and it can be considered how these agreements relate to customary international law. In order to not broaden the scope too much, the latter hierarchical relationship will not be examined any further in this dissertation.

230. What will be explored is the legal relationship between all three Nile Basin states and the reflection thereof on the GERD-project.

231. After having explored two pathways in the search for answers regarding the Nile Basin conflict - the first being the historical rights vested in treaties between the Nile Basin states and the second being the customary international law on the non-navigational uses of water - the question remains which one of these norms prevail.

232. The answer to this question is relevant, because it permits to address the essential topic of this dissertation. More specifically, "*Which rights do Ethiopia, Egypt and Sudan possess to endorse their claims on the Nile waters and how do these reflect on the lawfulness of Ethiopia's unilateral construction of the GERD on the Blue Nile?"*

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[339] J., WOUTERS, C., RYNGAERT, T., RUYS [and others], (2019). International law: a European perspective. Hart Publishing, Oxford, 1038 p.

[340] Supra.

[341] C., GREENWOOD, (2008). Sources of international law: an introduction. *United Nations Treaty Collection*; A., TAHVANAINEN, (2006). Hierarchy of norms in international and human rights law. Nordisk Tidsskrift for Menneskerettigheter, 24(3), 191-205.

233. As evidenced before, the customs regarding non-navigational uses of international rivers circles around the principle of equitable and reasonable use, which started to rise in the 20th century, when upstream riparian states began demanding more equitable rights on transboundary river utilization. Viewing that the international custom of equitable and reasonable use surfaced during the course of the 20th century[342] and the 1902 Agreements occurred at the beginning of it, it can be concluded that the customs are subsequent to the 1902 Agreement. It will therefore be examined whether subsequent international customs can alter prior treaties.

5.2. Modification of treaties by means of subsequent customs

234. The 1969 Convention stays quiet on the topic of modification by means of new customs conflicting with pre-existing treaty rules. While it was included in the convention's drafts, it never got concluded in the convention itself, due to international differences on the subject.[343] Instead, when dealing with subsequent international customs, the convention emphasized the importance of interpretation of treaties according to "*any relevant rules of international law applicable in the relations between the parties*."[344] The ILC's Study Group on the Fragmentation of International Law reiterated the importance of compatible interpretation in their report about norm conflicts. When multiple norms are applicable at once, they need to be interpreted in such a manner as to result in a compatible application, this according to the principle of harmonization.[345]

235. The latter, however, is not possible due to the fact that the 1902 Agreement prioritizes the downstream riparian states' veto power on construction (and thus is an implicit expression of the harm-principle), while the customary international law on non-navigational uses of international waters circles around the equitable and reasonable use principle. Because the 1902 Agreement and the customary international law on non-navigational uses of international waters remain irreconcilable, the harmonization through an inclusive interpretation is impossible.

236. However, these two principles have been said to be contrary to one another and more so, by the riparian states themselves. Egypt refuses to let go of its historical rights and the no-significant-harm principle, while also refusing to acknowledge Ethiopia's equitable and reasonable share in the Nile

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[342] Supra.
[343] M., J., BOWMAN & D., KRITSIOTIS, (2018). Conceptual and contextual perspectives on the modern law of treaties. Cambridge, United Kingdom: Cambridge University Press.
[344] Art. 31, §3, c) of the 1969 Convention; M., J., BOWMAN & D., KRITSIOTIS, (2018). Conceptual and contextual perspectives on the modern law of treaties. Cambridge, United Kingdom: Cambridge University Press.
[345] INTERNATIONAL LAW COMMISSION, Yearbook 2006, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf

resources. Because of the widely differing opinions of the riparian states, the hierarchy between the 1902 Agreement and customary law needs to be examined.

237. Art. 38, 1) of the ICJ statute[346] enlists the five primal sources of international law and goes as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

> *a)* ***international conventions****, whether general or particular, establishing rules expressly recognized by the contesting states;*
>
> *b)* ***international custom****, as evidence of a general practice accepted as law;*
>
> *c) the* ***general principles of law*** *recognized by civilized nations;*
>
> *d) subject to the provisions of Article 59,* ***judicial decisions*** *and the* ***teachings of the most highly qualified publicists of the various nations****, as subsidiary means for the determination of rules of law.*

238. There is no hierarchy between the five primary sources.[347] Consequently, viewing that treaty law and customary international law are both primary sources, there is no fixed hierarchy between the two norms.

239. This leads us to the use of the Latin adages of "*lex posterior derogat priori"* and *"lex specialis derogat generali*" [348] to establish the hierarchy between treaties and customs. These widely-accepted general principles of law respectively embody that a former norm of law gets surpassed by a subsequent one and that a more specific norm deserves priority over general norms.[349] The two fundamental rules are general legal principles, a primary source of international law, and are meant to close the gaps in international law.[350] So, these two fundamental principles are used to establish hierarchy between the 1902 Agreement and the international customs on non-navigational uses of transboundary rivers.

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[346] International Court of Justice, "Statute of the International Court of Justice", *International Court of Justice 2017-2024*, https://www.icj-cij.org/statute;
[347] T., RUYS, (2017). Inleiding tot het internationaal recht. Gent: VRG; J., WOUTERS, C., RYNGAERT, T., RUYS [and others], (2019). International law: a European perspective. Hart Publishing, Oxford, 1038 p.
[348] J., WOUTERS, C., RYNGAERT, T., RUYS [and others], (2019). International law: a European perspective. Hart Publishing, Oxford, 1038 p.
[349] T., RUYS, (2017). Inleiding tot het internationaal recht. Gent: VRG.
[350] T., RUYS, (2017). Inleiding tot het internationaal recht. Gent: VRG.

240. When simultaneously applying these two fundamental principles, it becomes clear that the *lex posterior* regime and the *lex specialis* regime sometimes are contradictory when a more specific norm precedes a more general one. While *lex specialis* would favor the more specific norm, the *lex posterior* would (in this case) favor the more general one.

241. As evidenced before, the entirety of customs regarding non-navigational uses of international rivers circles around the principle of equitable and reasonable use, which started making its rise in the 20th century, when upstream riparian states began to demand more resources than were initially allocated to them. Therefore, although this rarely occurs, it could be possible that by merely applying the *lex posterior* adage, customary international law alters a preceding treaty.[351] Adversely, the *lex specialis* principle speaks in favor of the 1902 Agreement, because treaties are more specific than the more general customary international law.[352]

242. A solution to this problem could be a third adage that combines both regimes, namely: "*lex posterior generalis non derogat legi priori speciali*". [353] A posterior, more general norm will not take priority over prior legal norms that are more specific. In this respect, Professor Ruys, confirms that bilateral treaties should not be put aside by posterior (multilateral) obligations under customary international law.[354] By following this statement, the bilateral 1902 Agreement deserves applicability above the more general and multilateral customs on non-navigational uses of international waters.

5.3. Multiplicity in establishing hierarchy

243. The solution to letting the 1902 Agreement prevail solely based on the application of one legal adage, seems a bit far reaching. Many 20th century river conflicts were solved based on customary law and to disregard the latter based on one hierarchical adage seems too limited. Especially when viewing that the ILC's study group stated that there are multiple means of establishing hierarchy. It would prove insufficient to assume customs are always more general than treaties. For this reason, the following other hierarchy establishing mechanisms will be briefly assessed hereunder.

244. The ILC's study group on the fragmentation of international law has made it clear in the preamble of its report that there are multiple ways to settle hierarchy conflicts.[355]

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[351] T., RUYS, (2017). Inleiding tot het internationaal recht. Gent: VRG.
[352] J., WOUTERS, C., RYNGAERT, T., RUYS [and others], (2019). International law: a European perspective. Hart Publishing, Oxford, 1038 p.
[353] T., RUYS, (2017). Inleiding tot het internationaal recht. Gent: VRG.
[354] T., RUYS, (2017). Inleiding tot het internationaal recht. Gent: VRG.
[355] INTERNATIONAL LAW COMMISSION, Yearbook 2006, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf

245. For example, according to the ILC's study group, exceptions to the *lex specialis* regime exist.

246. Certain principles of general law may not be derogated from by special law. *Jus cogens* norms are one of the examples, but also other considerations can be factored in for the prevailing of a more general norm.[356] The **considerations** are listed here:

I) "*Whether such prevalence may be inferred from the form or the nature of the general law or intent of the parties, wherever applicable;*

II) *Whether the application of the special law might frustrate the purpose of the general law;*

III) *Whether third party beneficiaries may be negatively affected by the special law; and*

IV) *Whether the balance of rights and obligations, established in the general law would be negatively affected by the special law.*"

247. When these considerations are applied to the Nile Bain conflict, the second and fourth could favor the more general customary international law, because obtaining Egyptian and Sudanese approval before installing constructions on the Nile respectively frustrate the purpose of the principle of equitable and reasonable use and disbalances the rights and obligations between riparian states as each riparian state is entitled to a limited sovereignty over its own territory as long as they do not exceed the boundaries of equitable and reasonable use.

248. Another legal maxim that arranges hierarchical order, according to the ILC, is the **theory of "special (self-contained) regimes**".[357]

249. According to the report there are three types of these special regimes.

I) A set of secondary rules concerning breaches (and reactions to breaches) of the set of primary rules that it accompanies.

II) A set of special rights and obligations that relate to a special subject matter, such as treaties on the protection of a particular river.

III) A set of rules as regulating "*a certain problem area*", such as the law of the sea.[358]

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[356] INTERNATIONAL LAW COMMISSION, Yearbook 2006, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf

[357] INTERNATIONAL LAW COMMISSION, Yearbook 2006, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf

[358] INTERNATIONAL LAW COMMISSION, Yearbook 2006, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf

250. The 1902 Agreement could fall under the second category of special regimes that envisions a set of special rights and obligations that relate to a special subject matter, such as treaties on the protection of a particular river.

251. On the other hand, the third category of special regimes might refer to the rules on non-navigational uses of international waters under customary international law, as the ILC refers to such a set of rules as regulating "a certain problem area", while also giving the example of the "law of the sea".[359]

252. The report additionally mentions that to the *lex specialis* adage can be applied to these special regimes. In the assumption that the 1902 Agreement would fall within the second category of special regimes and the customs fall within the third category, there would be two special regimes to consider. As a result, both the 1902 Agreement and the customs would be considered "specific", as they would both qualify as "special regimes". Consequently, the *lex specialis* regime would not be applicable anymore and only the *lex posterior* regime would be applied, resulting in the priority of 20th century customs over the preceding 1902 Agreement.

253. Although the ILC states that there is no superiority between mechanisms that establish the hierarchy of norms, both "considerations-exception" as the special regime exception to the *lex specialis* regime know too little accepted state practice[360] to surpass the widespread and accepted use of the *lex specialis* regime.

5.4. Preliminary conclusion

254. To conclude, although there is no superiority between hierarchy establishing mechanisms, both the "considerations-exception" as the special regime exception to the *lex specialis* regime know too little accepted state practice to surpass the widespread use of the *lex specialis* regime.

Hence, the *lex specialis* regime remains to be applied to the hierarchical conflict of norms, which would result in the continuous enforceability of the 1902 Agreement between the three Nile Basin states.

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[359] INTERNATIONAL LAW COMMISSION, Yearbook 2006, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf

[360] In the ILC report no reference to precedents is made with regard to the "considerations-exception" and only one precedent is named regarding the special regime exception (i.e., the Wimbledon case); INTERNATIONAL LAW COMMISSION, Yearbook 2006, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, vol. II, Part Two, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf; Wimbledon, Judgments, 1923, PCIJ, Series A, No. 1.

255. The former is with reservation to the possible exceptions to the dispositive treaties doctrine (i.e., the self-determination principle and the unequal treaties doctrine), which would make the 1902 Agreement unenforceable. In this case the question concerning the hierarchy of norms would not pose itself, because the treaty law would not be applicable and only customary international law could be applied.

6. LEGAL THEORY VERSUS STATE PRACTICE

256. If concluding that the 1902 Agreement potentially merits priority over the customary international law on non-navigational uses of transboundary rivers, the eventual outcome may appear inequitable. If the 1902 Agreement remains enforceable, Ethiopia might never be able to autonomically decide upon Nile construction in the future. This also means that the GERD is unlawful, and its construction means an internationally wrongful act.

257. The feeling that the legal solution to the conflict concerning the GERD seems unfair should, however, be separated from the fact that Ethiopia might have breached obligations under customary international law by establishing the GERD-project.

258. The biggest difficulty in deciphering the Nile Basin conflict is the fact that there is no overall consensus on whether a state is bound by colonial treaties after state succession. This is not only true for the North-East of Africa, but also in the Middle East there are disparities between legal theory on state succession regarding treaties and the state practice.

259. A brief comparison between the Jordan River conflict in the Middle East and the Nile Basin conflict in North-East Africa leads us to the same conclusion. To understand the conflict around the Jordan River is to understand a bit about the history in this part of the Middle East. The Jordan river's biggest tributary is the Yarmouk River, which is also the natural border between Jordan and both the Syrian Arab Republic and Israel.[361] For this reason, the Yarmouk River holds the same importance to the Jordan River as does the Blue Nile (also as biggest contributor) to the Nile River. It is useful to acquire as many vested rights on the Yarmouk River as possible, whether it be water allocations or constructions rights. Like the Nile Basin region, the Jordan Basin region lacks basin-wide agreements on their water management.[362] The biggest similarity between the Jordan Basin conflict and the Nile Basin conflict is the presence of colonial powers in the 20th century. Great Britain not only made its appearance in North-East Africa, but also in the Middle East. After the first world war Great Britain got accorded by the League of Nations with the mandate for Palestine, which at the time consisted of the West Bank, Gaza, Israel, and Jordan.[363]

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[361] FAO. (2009). *AQUASTAT Transboundary River Basins – Jordan River Basin.* Food and Agriculture Organization of the United Nations (FAO), 14 p.

[362] H. HUSSEIN & M. GRANDI, (2017). Dynamic political contexts and power asymmetries: the cases of the blue nile and the yarmouk rivers. International Environmental Agreements: Politics, Law and Economics, 17 (6), 795-814.

[363] R. M., MUKHAR, (2006). The Jordan River Basin and the Mountain Aquifer: The Transboundary Freshwater Disputes between Israel, Jordan, Syria, Lebanon and the Palestinians. Annual Survey of International & Comparative Law, 12, 59-86.

260. The British colonial powers engaged into multiple agreements with France, another colonial power in the region. At the time both Great Britain and France respectively held mandates in Palestinian and Syrian territory.[364] These agreements also fall within the category of dispositive treaties, because they include boundary regimes as well as regulation on water use of the Jordan River.[365] There are three Franco-British 20th century agreements[366] of dispositive nature that regulate the Jordan and Yarmouk River utilization in this region. These three agreements from the years 1920,[367] 1923[368] and 1926 were, overall, more beneficial for the Syrian territory than the Palestinian one, mostly because of the priority of Syria's historical water use before the Palestinian's.[369]

261. The conflictual aspect of this situation is that, after the Israeli independence, Israel refuted the obligations within these former colonial agreements and initiated hydroelectric projects disregarding these agreements. Syria, for its part, claimed this act to be in breach of the colonial agreements.[370]

262. Just like Egypt in the Nile Basin conflict, Syria claimed established water rights regarding the Jordan River because of the preceding Franco-British agreements. Israel, on the other hand, rejects the binding nature of agreements established by the former British powers and even more so, refutes their status as a successor state of Great Britain in total.[371] When Syria backed its concerns regarding Israel's hydroelectric power projects with the 1923 Agreement when going to the United Nations Security

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[364] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[365] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[366] United Nations, Franco-British Convention On Certain Points Connected With The Mandates For Syria and the Lebanon, Palestine and Mesopotamia, *Book 12: Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation*, UN Legislative Series, No. 63. V. 4, p. 286-288, https://legal.un.org/legislativeseries/pdfs/volumes/book12.pdf

[367] UNITED NATIONS LEGISLATIVE SERIES, book 12: Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation, *Franco-British Convention on Certain Points connected With the Mandates for Syria and the Lebanon, Palestine and Mesopotamia*. Paris, 23 December 1920, No. 63. V. 4, p. 286-288, https://legal.un.org/legislativeseries/pdfs/volumes/book12.pdf

[368] UNITED NATIONS LEGISLATIVE SERIES, book 12: Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation*, Exchange of Notes Constituting an Agreement Between the British and French Governments Respecting The Boundary Line Between Syria and Palestine from the Mediterranean to El Hamme*. Paris, 7 March 1923, No. 63. V. 4, p. 286-288, https://legal.un.org/legislativeseries/pdfs/volumes/book12.pdf

[369] K., B., DOHERTY, (1965). The Jordan Waters Conflict. International Conciliation, 35, 3-viii.

[370] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

[371] INTERNATINOAL LAW COMMISSION, *Report of the Commission to the General Assembly on the Draft articles on Succession of States in respect of Treaties with commentaries*, Yearbook of the International Law Commission, 1974, vol. II, Part One, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf

Council, Israel refuted the binding nature of this agreement, saying it did not devolve onto Israel, because Israel does not accept their status as a successor state from the British Mandate of Palestine.[372]

263. The lesson to be learned from this case study is that there is a big chasm between legal theory and practice in the field of state succession. Israel, in this viewpoint, does not even refute any international law on state succession regarding treaties. It rather just states that the entirety of the law on state succession is not applicable, because of the lack of state succession.

264. In most cases, successor states, like Israel, gain less by succeeding to colonial treaties compared to successor states Egypt and Sudan. The provisions within the 1902 Agreement are beneficial to Egypt and Sudan. Therefore, it seems unlikely that Egypt and Sudan would act like Israel and declare itself no successor state to Great Britain, because that would be less beneficial than simply being a successor state. It also seems unlikely that Ethiopia could follow Israel's reasoning of the no-state-succession-exception to evade the binding nature of the 1902 Agreement, because Ethiopia itself never underwent state succession.

[372] THE INTERNATIONAL LAW COMMISSION, Yearbook 1972, Volume II, *Documents of the twenty-fourth session including the report of the Commission to the General Assembly*, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1972_v2.pdf

7. CONCLUSION

265. Throughout this dissertation, it has become clear that a lot of uncertainty remains regarding the solution to the GERD-conflict. In this respect, multiple facets of international law lack a distinct consensus. Examples of this are:

-First, the proliferation of theories on state succession regarding treaties: Although, modern legal theory gravitates towards the clean slate theory, the Nyerere doctrine is making its uprising as well. The Nyerere doctrine symbolizes the political nature of the devolvement of treaties onto newly independent states, as these states could choose which treaties remain enforceable and which do not.

-Second, the degree to which the exceptions to the dispositive treaties doctrine would be accepted remains unclear as well.

-Lastly, the fact the ILC prescribes there is no superiority between the hierarchy establishing mechanisms, is not reflected in state practice, which results in the application of the *lex specialis* regime after all.

266. Nonetheless, an answer must be provided for the research questions posed in this dissertation.

267. So, exempted from the applicability of the exceptions of self-determination and the unequal treaties doctrine to the dispositive treaties doctrine, the majority of the legal reasoning in this dissertation led to the result where Ethiopia is still bound by the 1902 Agreement. This also means that the GERD is an unlawful project, due to Ethiopia's neglect for prior approval by Sudan and Egypt.

268. If however, the customary international law on non-navigational uses of transboundary rivers would be applicable to the conflict concerning the GERD, it could be concluded that Ethiopia might have conducted internationally wrongful acts. Due to the disproportionate and unnecessary large sizing of the GERD, Ethiopia might have breached the principle of equitable and reasonable use, which also constitutes as transboundary harm to Egypt and Sudan. Procedurally, Ethiopia might have failed to notify and consult Egypt and Sudan in a timely manner, in order for the latter states have a real impact on the GERD's structure.

269. Notwithstanding all of the above and given the degree of uncertainty at play with regard to the international law concerning the Nile Basin conflict, one must comprehend that, although this dissertation provides a theoretical answer to the conflict, realistic solutions often differs from it. The additional challenge in finding answers to the research questions in this dissertation is the contrast between legal theory and state practice in regions with many newly independent states. The realization grows that conflicts in the African continent are oftentimes are politically, rather than according to legal theory. After the withdrawal of colonial powers in North-East Africa, most state practice develops along the lines of the Nyerere doctrine, where the devolvement of prior treaties is

subjected to the states' own interests and views and is cherry-picked which treaties deserve continuous applicability.

270. To conclude, this dissertation's legal reasoning led to an answer regarding the lawfulness of the GERD on the Blue Nile in Ethiopia. However, the answer is not fully conclusive, due to the lack of an overall consensus in the bespoken fields of international law. This lack of consensus in combination with the gap between legal theory and state practice, affirms that the right nuances are in order when discussing the GERD conflict. The gap between legal theory and state practice also makes us believe that, in reality, the GERD conflict would not be resolved based on legal theory alone.

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